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5 UNITED STATES DISTRICT COURT
6 SOUTHERN DISTRICT OF CALIFORNIA
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8 HM ELECTRONICS, INC., a
9 California corporation,
10 Plaintiff,
11 v.
12 R.F. TECHNOLOGIES, INC., an
13 Illinois corporation, BABAK
14 NOORIAN, and individual,
15 Defendants.

16 Case No.: 12cv2884-BAS-MDD
17
18 ORDER RE MOTIONS RE
19 SANCTIONS AND CONTEMPT
20 AGAINST DEFENDANTS AND
21 THEIR ATTORNEYS FOR
22 DISCOVERY MISCONDUCT;
23
24 AND,
25 REPORT AND
RECOMMENDATION ON
PLAINTIFF'S REQUEST FOR
ISSUE SANCTIONS AND AN
ADVERSE INFERENCE
INSTRUCTION

[ECF No. 295]

26
27 On January 6, 2015, shortly after the close of discovery, Plaintiff
28 filed this joint motion alleging that Defendants intentionally withheld
29 and destroyed highly relevant electronically stored documents ("ESI").
30 (ECF Nos. 268, 288 (later refiled with redactions at ECF No. 295)). On
31 April 17, 2015, the parties filed a joint supplemental statement

1 pursuant to this Court's Order. (ECF Nos. 303, 304). On May 8, 2015,
2 Defendants filed an unsolicited supplemental declaration. (ECF No.
3 309).

4 On July 24, 2015, this Court issued an Order setting a hearing on
5 the joint motion and on the Court's own motion for sanctions under
6 Rule 26(g) against Defendants and their attorneys for improper
7 certifications of discovery responses. (ECF No. 414). On August 5,
8 2015, this Court held a hearing on the motions. (ECF No. 419).

9 Defendants and certain of their attorneys engaged in sanctionable
10 discovery practices in five ways:

11 1. Defendant Noorian, as CEO of Defendant R.F. Technologies,
12 Inc. ("RFT"), signed certifications of discovery responses specifically
13 stating that certain documents did not exist—even though it did; and
14 that Defendant had no knowledge whether certain events occurred—
15 even though it knew that those events, meetings and emails had
16 occurred. In that same vein, Defendants' attorney Thomas O'Leary
17 certified discovery responses as true, to his knowledge or belief, without
18 conducting a reasonable inquiry. This conduct justifies sanctions
19 against Defendants RFT and Noorian and attorney Thomas O'Leary
20 under Rule 26(g)(3).

21 2. Defendants' attorneys did not craft and implement a
22 litigation hold, or otherwise communicate to Defendants the importance
23 of preserving relevant documents. Sanctions under Rule 37 are
24 warranted against Defendant RFT, attorney Thomas O'Leary, and the
25 law firm LeClairRyan LLP for this failure.

1 3. Soon after learning of this lawsuit, Defendant Noorian sent
2 an email to Defendant RFT's sales force instructing them to "destroy"
3 documents because they were relevant to this lawsuit. Although
4 Defendants dispute whether any documents were actually deleted, the
5 evidence strongly supports a finding that an unknown number of
6 relevant documents were deleted as a result of Defendant Noorian's
7 instruction and by the failure to implement a litigation hold. Sanctions
8 against Defendant RFT under Rule 37 are warranted for the deletion of
9 ESI pursuant to the email commanding destruction.

10 4. Defendants' attorneys allowed the attorneys and vendors
11 handling the ESI production to use limiting search terms, such as the
12 word "confidential," which was part of every email sent from Defendant
13 RFT, to justify withholding as privileged and without further review,
14 more than 150,000 pages of ESI that were not privileged nor identified
15 in a privilege log. Rule 37 sanctions against Defendant RFT, attorney
16 O'Leary, and the law firm LeClairRyan LLP are warranted for this
17 failure.

18 5. Defendants' attorneys failed to produce over 375,000 pages
19 of ESI until well after the close of discovery because they failed to
20 perform quality control checks or to supervise their ESI vendor.
21 Sanctions under Rule 37 are warranted against Defendant RFT,
22 attorney O'Leary, and the law firm LeClairRyan LLP for this failure.

23 These events were revealed only as a result of Plaintiff's diligence,
24 and despite Defendants' stonewalling. But for Plaintiff's persistence,
25

1 Defendants would have gained a significant and unfair advantage at
2 trial.

3 Even though Plaintiff's diligence forced Defendants eventually to
4 produce the improperly withheld documents, relevant documents
5 remain missing. Plaintiff has been forced to litigate this case with
6 incomplete facts and to expend significant resources hunting down ESI
7 that should have been delivered to Plaintiff years ago.

8 Defendants and their attorneys do not dispute these events; they
9 dispute whether their behavior is sanctionable. Other than admitting
10 at the hearing on these motions that "mistakes were made," they are
11 unrepentant and deny responsibility. As discussed below, the Court
12 finds that sanctions are warranted by Defendants' and their attorneys'
13 behavior. The question is the form and severity of the sanction to be
14 imposed, and against whom.

15 **Facts**

16 **A. Nature of the Case**

17 Plaintiff makes drive-thru headset systems, including the ION IQ.
18 Defendant RFT repairs drive-thru headset products manufactured by
19 Plaintiff and by others (most notably, 3M and Panasonic). Defendant
20 Noorian is the CEO and founder of Defendant RFT. Plaintiff's First
21 Amended Complaint ("FAC") asserts claims for trademark
22 infringement, false designation of origin, trade dress infringement,
23 trade libel, unfair competition and interference with prospective
24 economic advantage. (ECF No. 156).

25

1 A key piece of Plaintiff's evidence is a document entitled "HM
2 Electronics IQ Failures" (the "Structural Failures Report" or "Report")
3 and other documents showing the distribution of this Report to
4 Plaintiff's competitors, customers and prospects. Plaintiff alleges
5 Defendants created the Structural Failures Report and designed it to
6 look like an HME internal quality control document. The Report,
7 purportedly authored by Plaintiff, acknowledged durability problems of
8 its ION IQ product. In fact, Defendants created the document, inserted
9 pictures of an ION IQ headset they had disassembled, and fabricated
10 the durability and lifetime repair cost information they distributed
11 along with the Report. Defendants distributed the fabricated
12 Structural Failures Report and average repair rate information to
13 clients, potential clients, and Plaintiff's competitors, including
14 Panasonic, who in turn distributed it to over 9,600 recipients.

15 **B. Summary of Discovery Disputes**

16 By the time this Court inherited this case, the docket—now
17 spanning over 400 entries—was riddled with discovery disputes. Many
18 of those disputes relate directly to this motion.

19 The previously assigned magistrate judges have held nine
20 discovery conferences, two settlement conferences, and two case
21 management conferences. (ECF Nos. 29, 32, 38, 50, 62, 64, 65, 71, 76,
22 77, 83, 84, 98). Attorneys Thomas O'Leary and Mark Goldenberg
23 appeared on behalf of Defendant RFT at most of these conferences.
24 (*Id.*). Many of the conferences focused primarily on "the status of
25 defendant's production of documents." (See e.g., ECF Nos. 60, 62, 64,

1 65). Magistrate Judge McCurine, originally assigned to the case,
2 focused the parties' attention on "any remaining e-discovery issues" as
3 early as August 22, 2013. (ECF Nos. 38, 36). Following one of the
4 discovery conferences, Magistrate Judge McCurine issued an Order that
5 required Defendant RFT¹ to complete its document production by
6 February 10, 2014, and required its attorneys to complete the privilege
7 log by February 17, 2014. (ECF No. 71). The magistrate judges
8 assigned to this case have also entertained nine motions seeking
9 contempt or sanctions, several motions seeking miscellaneous
10 discovery-related relief, and have continued discovery and pre-trial
11 deadlines four times because of document production issues. (ECF Nos.
12 70, 72, 88, 90, 101, 105, 106, 138, 185-187, 203, 204, 209, 219, 224, 251,
13 268, 295).

14 In a July 3, 2014, discovery Order, Magistrate Judge Burkhardt
15 found Defendant RFT had violated the non-ESI portions of Magistrate
16 Judge McCurine's January 27, 2014, Order requiring it to complete its
17 document production by February 10, 2014. (ECF No. 185). Magistrate
18 Judge Burkhardt declined to find that Defendant RFT had violated the
19 January 27, 2014, Order as to its ESI production because the Order was
20 not specific enough about the search term agreement for the ESI
21 production. (*Id.*). Magistrate Judge Burkhardt ordered Defendant RFT
22 to complete its production—including ESI—by August 4, 2014, and
23

24 ¹ At the time, Defendant RFT was the only named defendant. Roughly
25 one and a half years later, on May 27, 2014, Mr. Noorian was added as
a defendant. (ECF No. 156).

1 ordered Defendant to submit a sworn declaration to Plaintiff certifying
 2 that requested documents had been produced, identifying the
 3 documents responsive to each request by Bates number, and “mak[ing]
 4 a detailed showing as to whether adequate searches were conducted in
 5 response to the January 27, 2014, Order, including an explanation of
 6 the search terms, custodians, computer drives, or other locations
 7 searched.” (ECF No. 185 at 10). Magistrate Judge Burkhardt also
 8 awarded Plaintiff \$15,224.62 (half of its requested costs and fees in
 9 bringing the motion) as Rule 37 sanctions against Defendant RFT.
 10 (*Id.*).

11 **C. Detailed Facts re Discovery Misconduct**

12 **i. The “Destroy” Email**

13 **i. Service of Complaint on Defendants**

14 On December 5, 2012, Plaintiff served Defendant RFT with the
 15 summons and complaint in this matter. (ECF No. 5). Defendant
 16 Noorian was Defendant RFT’s top executive and its agent for service of
 17 process. (*Id.*). Defendant Noorian knew of the lawsuit that day, and
 18 understood then that Plaintiff was complaining about RFT’s use of the
 19 bogus Structural Failures Report. (ECF No. 288-22 (Exh. 42) at 19:10-
 20 17).

21 **ii. December 6, 2012 email to Noorian**

22 That very evening, at 4:50 p.m., Defendant Noorian sent an email
 23 to Mark Sullivan, then Director of Sales at RFT, with a courtesy copy to
 24 Tony DeLise, President and COO. (ECF No. 268-21 (Exh. 14) at 2).
 25 Defendant Noorian wrote: “Mark, HME is claiming that we are,

1 specifically you [sic] certain material that is false and hurtful to their
2 business. Please provide me with ALL the examples of your sales
3 material that relates to HME before end of day tomorrow.” (*Id.*).

4 The next day, Mr. Sullivan responded and attached “a complete
5 zip of materials that pertain to this,” and listed the contents of that zip
6 drive as follows:

7 Benefits of Attune

8 Attune durability and ION mechanical failures

9 Dunkin Brands attune web flyer

10 Numerous emails pushing Attune with attachments of above

11 Example of typical customer dialog about HME breaking down

12 Typical email of RFT superior repairs and cost savings

13 Some Clip lines of copy that are used in various proposals to
14 customers

15 (*Id.* at 2-3). The bogus Structural Failures Report was included, as
16 were internal emails about RFT’s creation of the Report, pictures RFT
17 had taken of Plaintiff’s product that were used in the Report,
18 statements about the durability and cost of Plaintiff’s product, and
19 emails distributing the Report. The zip drive included five screenshots
20 showing 100+ electronic documents that Mr. Sullivan found on his
21 computer using the search term “attune.” (ECF No. 307-7 (Exh. 54)).
22 Mr. Sullivan used both his marks@rftechno.com and his
23 business.management@rftechno.com addresses in emails included in

1 the zip drive that Defendant Noorian received. (ECF No. 268-21 (Exh.
 2 14) at 4 and 11; *see also*, ECF No. 307-7 (Exh. 54) at 11 (screenshot in
 3 zip file showing “Emails Pushing Attune Since July 2011” showing
 4 “From: business management” regarding the highlighted email).
 5 Defendant Noorian looked at the contents of the zip file when he
 6 received it from Mr. Sullivan. (ECF No. 288-2 (Exh. 42) at 21:13-17).

7 On December 6, 2012, Defendant Noorian instructed Helen
 8 Fansler, his executive assistant, to create a file with Mr. Sullivan’s
 9 email and zip file “so we can access it when the time comes.” (ECF No.
 10 288-17 (Exh. 35)). Ms. Fansler created both a hard copy and an
 11 electronic version of the folder. (ECF No. 288-2 (Exh. 42) at 22:3-16).

12 **iii. Email to employees to “destroy” documents**

13 On December 19, 2012, Defendant Noorian sent Mark Sullivan
 14 (former RFT Director of Sales), Philip Tondelli (RFT VP of Sales), and
 15 Tony DeLise (RFT President) an email instructing them to destroy all
 16 “electronic and printed copies any of you may have” of the “HME failure
 17 pictures” in the Structural Failures Report. (ECF No. 288-13 (Exh. 31)).
 18 Defendant Noorian sent another email approving Mark Sullivan’s offer
 19 to forward the “destroy” instruction to other employees, which he did.
 20 (ECF No. 288-14 (Exh. 32); ECF No. 288-15 (Exh. 33)). Defendant
 21 Noorian never retracted nor clarified his instructions. (ECF No. 288-22
 22 (Exhibit 42) at 13-14, 41-42).

23 Plaintiff has identified, through third party subpoenaed
 24 documents, Report-related documents that Defendants failed to produce
 25 on their own. (ECF No. 305-1 (Herrera Decl.) ¶ 14). Specifically,

1 Plaintiff points to the Mark Sullivan December 6, 2012, email and zip
2 file containing relevant documents. At his deposition on April 1, 2014,
3 Mark Sullivan produced the email and attached zip file. (ECF Nos.
4 268-21-24 (Exh. 14), 268-25 (Exh. 15)). Attorneys Thomas O'Leary and
5 Mark Goldenberg appeared on behalf of Defendant RFT at Mr.
6 Sullivan's deposition. (ECF No. 268-25 (Exh. 15) at 4). Defendant did
7 not produce any version of the email until one year later, in April of
8 2015. (*Id.* ¶¶ 14-15; ECF No. 305-2 (Exh. 55)). The version Defendant
9 produced is missing some of the documents in the zip file that were
10 produced by Mr. Sullivan. (*Id.*). Defendants also have not been able to
11 confirm production of all of the 100+ documents shown in the five
12 screen shots. (*Id.*; ECF No. 309 (Vanderhoof Supp. Decl.)).

13 **2. False Verifications and Declarations**

14 Plaintiff first requested the documents at the center of this
15 dispute from Defendant RFT on August 26, 2013, soon after discovery
16 opened. (ECF No. 125-11 at 2). Defendant agreed to begin its rolling
17 document production by October 18, 2013, but did not begin producing
18 documents until November 25, 2013. (ECF Nos. 101-4 at 2; 101-6 at 2;
19 185 at 1-2 (Magistrate Judge Burkhardt's July 3, 2014, Order); 268-2 ¶
20 4).

21 **i. Written responses to document demands**

22 Defendant RFT served its written responses to the request for
23 production of documents on October 18, 2013. (ECF Nos. 268-17 (Exh.
24 11) at 11). Defendant RFT's lead counsel Thomas O'Leary signed these
25 written responses on October 16, 2013. (*Id.* at 10).

1 In response to Request No. 23, seeking documents concerning “the
2 creation, receipt, use, publication and/or distribution of the
3 DOCUMENT entitled ‘HM Electronics IQ Structural Failures,’”
4 Defendant asserted objections and then falsely stated that it “may have
5 responsive documents, but is uncertain at this time.” (ECF No. 268-15
6 (Exh. 11) at 15). Defendant provided the same false response to
7 Request No. 25, seeking documents reflecting communications about
8 the Structural Failures Report. (*Id.* at 16). Defendant also falsely
9 responded that it “may have responsive documents, but is uncertain at
10 this time,” in response to Request No. 41 seeking pictures taken of
11 Plaintiff’s product for any purpose. (ECF No. 268-16 (Exh. 11) at 8).

12 RFT refused to provide documents in response to Request No. 26,
13 which sought documents between RFT and Panasonic about the
14 Structural Failures Report, on the grounds that such documents are
15 irrelevant. (ECF No. 268-15 (Exh. 11) at 16-17).

16 In response to Request No. 28, RFT refused to produce documents
17 concerning its “opinions, statements, AND/OR declarations regarding
18 the repair frequency of any HME Drive-Thru Headset Product,” because
19 “it could be thousands of documents every year.” (ECF No. 268-16 (Exh.
20 11) at 1). Defendant refused to produce documents responsive to
21 Request No. 33, calling for communications with third parties about
22 Plaintiff’s products, also on the basis that “it could be thousands of
23 documents every year.” (*Id.* at 3-4). Defendant offered the same
24 response to Request No. 34, which called for communications with third
25

1 parties about Defendant's advertisements concerning Plaintiff or its
 2 products. (*Id.* at 4).

3 After Plaintiff challenged the sufficiency of these responses,
 4 Defendant RFT provided supplemental responses. (ECF No. 268-18,
 5 268-19 (Exh. 12)). Defendant RFT's lead counsel Thomas O'Leary
 6 signed the supplemental responses on December 12, 2013, and
 7 Defendant Noorian, in his capacity as President of RFT, verified the
 8 supplemental responses under penalty of perjury on December 5, 2013.
 9 (ECF No. 268-19 (Exh. 12) at 6-7).

10 In response to Request No. 26, concerning documents between
 11 RFT and Panasonic about the Structural Failures Report, Defendant
 12 falsely supplemented: "Responding Party has produced documents
 13 responsive to this Request." (*Id.* at 3).

14 In response to Request No. 28 seeking documents concerning
 15 RFT's "opinions, statements, and/or declarations regarding the repair
 16 frequency of any HME drive-thru product, for the period January 1,
 17 2005 to the present," Defendant's supplemental response stated
 18 "Responding Party has no documents responsive to this request." (ECF
 19 No. 268-19 (Exh. 12) at 4-5).

20 **ii. Responses to first set of interrogatories**

21 Defendant RFT served interrogatory responses on October 18,
 22 2013. (ECF No. 268-11 (Exh. 8) at 11). RFT's lead counsel Thomas
 23 O'Leary signed the interrogatory responses on October 16, 2013. (*Id.* at
 24 9). Defendant Noorian signed the interrogatory responses under
 25 penalty of perjury on October 18, 2013. (*Id.* at 10).

1 In response to Interrogatory No. 13, “identify all persons to whom
 2 you provided the ‘HM Electronics IQ Structural Failures’ document or
 3 any of the contents set forth therein,” Defendant RFT objected and
 4 stated that Mark Sullivan, who was no longer employed with RFT,
 5 could identify such persons. (*Id.* at 6).

6 Defendant provided only objections in response to Interrogatory
 7 No. 20, “identify all person(s) with Panasonic who may have knowledge
 8 regarding the content and distribution of the ‘HM Electronics IQ
 9 Structural Failures’ document.” (*Id.* at 8-9).

10 When Plaintiff challenged the sufficiency of these responses,
 11 Defendant supplemented them. (ECF No. 268-12 (Exh. 9)). The
 12 responses were signed by James C. Hildebrand for Thomas O’Leary,
 13 and were verified under penalty of perjury by Defendant Noorian. (*Id.*
 14 at 9).

15 Defendant revised Interrogatory No. 13 to falsely state that “Mark
 16 Sullivan is the only person with knowledge to whom, if anyone, the ‘HM
 17 Electronics IQ Structural Failures’ document was distributed.” (*Id.* at
 18 6). Defendant also revised its response to Interrogatory No. 20,
 19 responding that RFT “is unaware of any person at Panasonic who may
 20 have knowledge regarding the content and distribution of the ‘HM
 21 Electronics IQ Structural Failures’ document.” (*Id.* at 8).

22 **iii. Defendant RFT’s initial document collection**

23 Defendant RFT made its first document production in hard copy
 24 format on November 25, 2013. (ECF Nos. 101-6 at 2; 185 at 2; 268-2 ¶
 25 4). Internal emails show that RFT was gathering ESI for review on

1 November 1, 4, and 5, 2013. (ECF No. 288-18 (Exh. 38); ECF No. 307-3
 2 (Exh. 50); ECF No. 307-4 (Exh. 51); ECF No. 307-5 (Exh. 52); ECF No.
 3 307-6 (Exh. 53)). Defendant Noorian testified he was not involved in
 4 collecting documents for production and that Helen Fansler, Executive
 5 Administrator, and Steve Combs, IT Director, “were the key people in
 6 gathering the documents.” (ECF No. 288-22 (Exh. 42) at 23:8-12).

7 One email from Helen Fansler to Defendant Noorian entitled
 8 “Number 17 of Production,” asks whether Defendant Noorian wants
 9 “any more changes made to it,” and that Scott “already took out part
 10 numbers and one of the pictures.” (ECF No. 307-3 (Exh. 50) at 2). She
 11 finished, “[g]oes with No. 17...Your inspection, testing, repair and
 12 maintenance guidelines, procedures and/or instructions (including
 13 drafts), for HME’s Drive-Thru Headset Products...” (*Id.*; *see also*, ECF
 14 No. 307-5 (Exh. 52)).

15 In two other emails dated November 4, 2013, with subject lines
 16 referring to “IQ Failures” from Helen Fansler to Defendant Noorian,
 17 she asks Defendant Noorian for his approval to forward attached emails
 18 to attorney Mark Goldenberg. (ECF No. 288-18 (Exh. 38) at 11; ECF
 19 No. 307-1 (Exh. 47B)). The emails she sought permission to forward to
 20 the attorney were Mark Sullivan sales emails to customers attaching
 21 the Structural Failures Report and related information. (*Id.*).

22 Another email from Scott Crause, VP of Operations, to Scott
 23 Richardson asks for repair procedures for the HME 6000 AIO and the
 24 HME 2000 “for the thing I’m working on.” (ECF No. 307-4 (Exh. 51)).
 25 Scott Richardson found one, which he attached as “Hs6000

1 procedure.doc," but could not find the other, acknowledging "I know we
2 had one but it is not in the folder anymore," so he offered to "type one
3 up quickly." (*Id.*). A few days later, Ms. Fansler sent Scott Crause an
4 email with an attachment titled "HS6000 laywer (2).doc," explaining
5 formatting changes she had made. (ECF No. 307-5 (Exh. 52)). A little
6 while later, Scott Crause sent Ms. Fansler an email asking her to
7 "rework this like you did the other one and send back to me." (ECF No.
8 307-6 (Exh. 53)).

9 Although Defendant RFT gathered all these emails and their
10 attachments in November 2013, it did not produce any of them for over
11 a year. Defendant produced one of them on November 17, 2014, and did
12 not produce the rest of them until January 8, 2015.

13 **iv. Responses to second set of interrogatories**

14 On July 9, 2014, Defendants served responses to Plaintiff's second
15 set of interrogatories. (ECF No. 288-8 (Exh. 22)). The objections were
16 signed by Thomas O'Leary. (*Id.*). Defendant Noorian verified the
17 responses under penalty of perjury. (*Id.*). Interrogatory No. 23 called
18 for Defendants to identify the participants, date, and location of any
19 meetings from January 1, 2012, to the present between RFT and
20 Panasonic where HME was discussed. (*Id.* at 9). Defendants provided
21 no substantive response, but included a page of objections, including
22 objections to terms like "present," "meetings," "discussed," "mentioned,"
23 "Panasonic Systems Communications Company of North America," and
24 "referred to" on the grounds that they were "undefined, vague,
25 ambiguous and lack foundation." (*Id.*).

1 Defendant supplemented this response in August of 2014 with
 2 this false statement:

3 RFT does not possess any information within its
 4 possession, custody, or control that is responsive to
 5 Plaintiff's request identifying the persons present, as
 6 well as the date and location of all meetings between
 7 Defendant Panasonic, wherein Plaintiff was discussed,
 8 mentioned, or referred to from January 1, 2012 to the
 9 present date. However, the Defendant can identify that
 10 Mark Sullivan and Lillia Taschuk—who are no longer
 11 employed by the Defendant—may possess information,
 12 if such may exist, responsive to this request because
 13 they would have been the individuals involved in any
 14 such meetings, had they taken place.

15 (ECF No. 269-2 (Exh. 23) at 10-11). This supplemental response was
 16 signed by Thomas O'Leary on August 21, 2014, and verified by
 17 Defendant Noorian on August 22, 2014. (*Id.* at 11-12).

18 **v. Document production assurances**

19 In advance of a December 12, 2013, conference with Magistrate
 20 Judge McCurine, the parties submitted a joint letter to the court, signed
 21 by Brian Vanderhoof of LeClairRyan LLP, in which Defendant RFT
 22 stated that it had produced 1004 pages of documents, and insisted that
 23 “[a]ll other responsive documents have been made available for review
 24 and inspection as they are maintained in the usual course of business”
 25 in the form of 200 boxes of hard copy documents in warehouses in
 Illinois.² (ECF No. 125-11).

² The boxes in Illinois warehouses did not contain the ESI documents at issue in this motion.

1 As of January 9, 2014, Defendant had produced a “grand total” of
2 1,183 documents. (ECF No. 125:13:19-20). Mr. O’Leary wrote
3 Plaintiff’s counsel that “[a]ll documents responsive have been
4 produced..... R.F. Technologies diligently searched for responsive
5 documents....” (ECF No. 268-20 (Exh. 13) at 2). Mr. O’Leary further
6 stated “[n]o responsive documents were withheld on account of
7 privilege.” (*Id.* at 3).

8 On January 22, 2014, Defendant represented in a joint letter to
9 Magistrate Judge McCurine that it would search further for specified
10 categories of documents, including emails regarding the Report or the
11 average repair rate and cost information, as well as communications
12 between RFT and any third party about Plaintiff or its products. (See
13 ECF No. 185 (Magistrate Judge Burkhardt’s Order describing contents
14 of January 22, 2014 letter)).

15 During a February 28, 2014, court-ordered meet and confer
16 discussion, the following exchanges took place between counsel:

17 MS. HERRERA: The next topic concerns RFT
18 product durability claims and particularly it’s
19 representations made in their structural failures report
20 and communications regarding the same. And the point
21 we made previously was that your client produced very
22 little documents on this point and you agree to
undertake an ESI search for further responsive
documents. And we’ve seen nothing further.

23 MR. O’LEARY: All right. All e-mails responsive to that
24 have been produced.

1 MS. HERRERA: Are you representing that your client
2 did undertake—

3 MR. O'LEARY: I'm not representing anything. I'm
4 saying that all e-mails have been produced.

5 MS. HERRERA: Well, I'm looking at our joint letter to
6 Judge [McCurine] on January 22nd, that you agreed that
7 your client will undertake a further ESI search for
8 responsive documents on RFT server, including, but not
9 limited to, e-mails received by former employee, Mark
Sullivan. So my question is did your client do that?

10 MR. O'LEARY: Yes. And the e-mails regarding [the] IQ
11 structural failures report have been produced. And I
12 think we have said in previously meet and confers,
Mark Sullivan's work computer had very little on it.

13 MS. HERRERA: Is that the only place you searched is
14 his work computer?

15 MR. O'LEARY: That's not what I said. The e-mails
16 with regard to the IQ structural failure report have been
17 produced.

18 MS. HERRERA: Just so I'm clear, you produced some
19 early on in the Bates label 172 to 262 range.

20 MR. O'LEARY: Yes.

21 MS. HERRERA: Have you produced anything beyond
22 that?

23 MR. O'LEARY: No. All the e-mails with regard to RFT
24 structural report were produced in the responsive
25 documents.

1 MS. HERRERA: And a search was undertaken beyond
2 Mark Sullivan's information?

3 MR. O'LEARY: Yes.

4 (ECF No. 268-27 (Exh. 17) at 14-15).

5 MS. HERRERA: We're just really surprised that
6 virtually—hardly any third-party communications have
7 been produced.

8 MR. O'LEARY: Everything's been produced.

9 MS. HERRERA: Did your client conduct an ESI search
10 for communication[s]?

11 MR. O'LEARY: Everything has been produced.

13 MS. HERRERA: Well, that's not really my question.

14 MR. O'LEARY: That's my response, though. We
15 produced everything when we did that by checking
16 computers.

17 MS. HERRERA: I'd like to understand the methodology
18 you did conduct.

19 MR. O'LEARY: I didn't conduct the ESI search, so I
20 don't know the methodology. They were told to look for
21 documents on their computer. They did so and we
22 produced them. *** [T]hey obviously conducted the
search and produced what they had.

23 (*Id.* at 23:1-21).

24 Defendant had not reviewed or produced its ESI as of the date Mr.
25 O'Leary made these statements. It was not until March of 2014 that

1 Setec, one of Defendant's ESI vendors, "was tasked by Thomas O'Leary
 2 from LeClairRyan... to perform keyword searches against [data totaling
 3 over 300 GB] to isolate and extract potentially relevant
 4 communications." (ECF No. 269-28 (Decl. of Todd Stefan, ESI vendor
 5 Setec's Vice President) ¶ 4). Defendant's vendor Setec provided the
 6 processed data to vendor iDiscover in two batches on April 25 and 28,
 7 2014, and iDiscover later provided the processed data to Defendants'
 8 attorneys. (*Id.* at ¶ 5).

3. Lack of Litigation Hold

10 During a December 2014 deposition limited to the purpose of
 11 exploring and curing the alleged spoliation, Defendant Noorian could
 12 not remember whether any attorney ever told him to preserve
 13 information in connection with the lawsuit or told him not to destroy or
 14 delete anything. (ECF No. 288-22 (Exhibit 42) at 13:7-20, 41-42). He
 15 had never heard the term "Litigation Hold Notice" before. (*Id.* at 13:17-
 16 20). When asked if "RFT ever had cause to send out something similar
 17 to [] a Litigation Hold Notice telling employees to make sure not to
 18 destroy and to preserve certain documents," Defendant Noorian said
 19 "no." (*Id.* at 14:4-10).

20 Before this Court, at the hearing on these motions, the
 21 LeClairRyan attorneys conceded that they had not done anything
 22 specific to preserve ESI, because they were satisfied with Defendant
 23 Noorian's assertion that RFT does not delete documents in the normal
 24 course of business.

25

1 RFT does not have a written policy requiring employees to
2 preserve and not delete data. (*Id.* at 41:10-18, 42:7-11). And, “nothing
3 was sent out” to employees in this case to tell them to preserve
4 documents. (*Id.* at 42:12-20). Defendant Noorian testified that “[a]s far
5 as I know, nobody destroys anything within our company,” but conceded
6 that deletion was possible, because not all employee work is performed
7 on computers backed up by the server, and “I’ve got 60 employees. I
8 can’t possibly check everybody’s behavior.” (*Id.* at 7:1-16, 9:11-20, 12-
9 13, 36:24-37:4, *see also*, 29:1-11; ECF No. 288-25 (Exh. A) at 11:5-12:4).

10 Defendant Noorian also testified that, to his knowledge, no efforts
11 had been made to see if anyone had deleted documents, or to recover
12 any documents that had been deleted. (*Id.* at 30:12-31:1). Defendants
13 have not provided declarations from any RFT employees stating that
14 they did not destroy, delete or alter any documents. At the hearing,
15 Defendants’ attorneys argued that they recently hired a computer
16 forensic expert to analyze Mark Sullivan’s laptop, but they conceded
17 that the computer forensic expert has not analyzed other RFT
18 employees’ computers to determine if documents were deleted.

19 **4. ESI Withheld As Privileged Without Review Based**
20 **Solely On Limiting Search Terms**

21 Defendant RFT’s attorneys withheld more than 150,000 non-
22 privileged documents as privileged even though no privilege review was
23 conducted, simply because they contained search terms like
24 “confidential.” (ECF No. 268-2 ¶ 8 (declaration of Brian Vanderhoof of
25 LeClairRyan LLP describing search term error)). Defendants’ lead

1 counsel temporarily delegated ESI discovery to another firm, which—
 2 unbeknownst to anyone except RFT’s IT Director—used 59 exclusionary
 3 search terms to withhold documents as privileged. (ECF No. 268-2).
 4 Defendant RFT’s email program automatically affixes a confidentiality
 5 footer to emails, so emails were withheld merely because they contained
 6 the term “confidential.” The other exclusionary search terms similarly
 7 resulted in other non-privileged documents being withheld. No one
 8 reviewed the withheld documents, or even a sample of them, to
 9 determine if they actually were privileged, and they were not listed on a
 10 privilege log. (ECF No. 269-4 (Exh. 25) at 3).

11 Even so, Defendants’ lead counsel repeatedly confirmed that all
 12 responsive non-privileged documents had been produced. On July 25,
 13 2014, in response to Magistrate Judge Burkhardt’s July 3, 2014 Order
 14 requiring completion of the document production, Thomas O’Leary sent
 15 Plaintiff’s counsel a letter emphasizing that “during the pendency of the
 16 Court’s decision on Plaintiff’s motion for discovery sanctions, RFT did
 17 indeed produce all of the documents sought by Plaintiff.” (ECF No. 268-
 18 30 (Exh. 19) at 4).

19 On August 8, 2014, Thomas O’Leary filed a declaration signed
 20 under penalty of perjury in response to Magistrate Judge Burkhardt’s
 21 July 3, 2014, discovery Order. (ECF No. 192). He declared, “during the
 22 three-month pendency of the Court’s decision on Plaintiff’s motion, RFT
 23 did indeed produce all of the documents sought by Plaintiff.” (*Id.* ¶ 3;
 24 *see also* ¶¶ 4 and 5 (essentially restating same)). Mr. O’Leary attached
 25 and described his July 25, 2014, letter to Plaintiff’s counsel. (*Id.* ¶ 6).

1 Mr. O'Leary then went through the discovery requests at issue one-by-
 2 one and serially declared that RFT had produced all responsive
 3 documents. For instance, he declared,

4 RFT was ordered to produce all emails and other
 5 communications regarding the "HM Electronics IQ
 6 Structural Failures" document it published. (Dkt. No.
 7 185, p.12:21-22). However, RFT has already produced to
 8 Plaintiff's counsel its emails and other communications
 9 regarding the "HM Electronics IQ Structural Failures"
 document....

10 (*Id.* ¶ 22; *see also id.* ¶¶ 24, 26, 28, 30). Finally, Mr. O'Leary declared
 11 that "RFT has already produced the documents resulting from the
 12 [court-ordered] ESI searches to Plaintiff's counsel." (*Id.* ¶ 31). Mr.
 13 O'Leary concluded by accusing Plaintiff of conducting a "tiresome and
 14 incessant 'discovery war'." (*Id.* ¶ 33).

15 Also in response to Magistrate Judge Burkhardt's Order, Stephen
 16 Combs, RFT's Director of IT, signed a declaration on September 3, 2014.
 17 (ECF No. 268-5). Mr. Combs declared, in part, that he "provided a
 18 wealth of electronic data to RFT's electronic discovery vendor,"
 19 including 4 Exchange Information Stores (including 146 individual
 20 email accounts) and 17 PST files that totaled over 300 GB. (*Id.* at ¶ 14).

21 Mr. Combs further declared "[i]t is my understanding that these
 22 email accounts were searched using key terms provided by Plaintiff. I
 23 am informed and believe that the search terms utilized by the vendor
 24 included the following: [listing 21 search terms]. I am further informed
 25 and believe that these search terms were later revised to include certain

1 Boolean search limiters." (*Id.*). Mr. Combs did not explain what
 2 limiters were implemented for whom and for what purpose, and the
 3 statement did not catch the litigants' attention at the time. Mr. Combs
 4 further declared that he understood that under Magistrate Judge
 5 Burkhardt's Order,

6 RFT must conduct a broad-based ESI search using
 7 twenty-two agreed upon search terms, and it must
 8 produce documents resulting from such ESI searches.
 9 (Dkt. No. 185, p. 13:13-17). As set forth at paragraph 14
 10 above, RFT has already produced the documents
 11 resulting from the foregoing ESI searches to Plaintiff's
 12 counsel.

13 (*Id.* at ¶ 26).

14 The search term/privilege review error was finally discovered
 15 when Plaintiff used Mr. Combs' Declaration to show an inconsistency
 16 between the amount of data Defendant RFT provided its vendor and the
 17 amount of data produced, along with a comparison of documents
 18 produced by third parties that had not been produced by Defendant. As
 19 a result, Defendant produced these documents on a rolling basis from
 September to November 2014.

20 **5. Post-Discovery Document Dump**

21 Defendant RFT also did not produce over 375,000 pages of
 22 responsive documents until after the filing of this motion and the close
 23 of discovery. Defendant explains this occurred because the ESI vendor
 24 inadvertently failed to export all of the data to be produced. (ECF No.
 25 269-28 (Stefan Decl.) ¶ 5). One of the ESI vendor's employees, believing

1 the data export complete, disconnected the drive before all the data had
2 been exported. Defendants and their vendor discovered the error in
3 December 2014 while preparing their opposition to this motion. They
4 produced the newly-discovered data on a rolling basis between January
5 and April 2015. In May 2015, the Defendants' attorneys produced still
6 more documents that had been improperly withheld. (ECF No. 309).

Discussion

A. Legal Standard

9 The Court's authority to sanction a party for spoliation of evidence
10 arises from both its inherent power to impose sanctions in response to
11 litigation misconduct and from Rule 37. See FED. R. CIV. P. 37(b)(2)(C);
12 *Lewis v. Ryan*, 261 F.R.D. 513, 518 (S.D. Cal. 2009). Rule 37(b)(2)(A)
13 states:

If a party or a party's officer, director, or managing agent—or a witness designated under Rule 30(b)(6) or 31(a)(4)—fails to obey an order to provide or permit discovery, including an order under Rule 26(f), 35, or 37(a), the court where the action is pending may issue further just orders. They may include the following:

- (i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
 - (ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
 - (iii) striking pleadings in whole or in part;

- (iv) staying further proceedings until the order is obeyed;
 - (v) dismissing the action or proceeding in whole or in part;
 - (vi) rendering a default judgment against the disobedient party; or
 - (vii) treating as contempt of court the failure to obey any order except an order to submit to a physical or mental examination.

Subsection (b)(2)(C) adds:

Instead of or in addition to the orders above, the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust.

The Court also has authority to sanction parties and counsel under Rule 26(g). Rule 26(g) requires a signature by a party or its counsel on discovery responses and objections, and states:

By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

- (A) with respect to a disclosure, it is complete and correct as to the time it is made; and
 - (B) with respect to a discovery request, response, or objection, it is:

- 1 i. consistent with these rules and warranted
2 by existing law....;
- 3 ii. not interposed for an improper purpose, such
4 as to harass, cause unnecessary delay, or
5 needlessly increase the cost of litigation; and
- 6 iii. neither unreasonable nor unduly
7 burdensome or expensive....

8 FED. R. CIV. P. 26(g)(1). The Court, “on motion or on its own, must
9 impose an appropriate sanction on the signer, the party on whose behalf
10 the signer was acting, or both,” when a certification violates Rule
11 26(g)(1) without substantial justification. FED. R. CIV. P. 26(g)(3). Rule
12 26(g) is “cast in mandatory terms.” *Chambers v. NASCO, Inc.*, 501 U.S.
13 32, 51 (1991); Advisory Committee Notes to 1980 Amendment to FED. R.
14 CIV. P. 26(g) (“Because of the asserted reluctance to impose sanctions on
15 attorneys who abuse the discovery rules,... , Rule 26(g) makes explicit
16 the authority judges now have to impose appropriate sanctions and
17 requires them to use it.”). The mandate extends to *whether* a court
18 must impose sanctions, though not to *which* sanction to impose. *Id.*

19 Federal courts do not require perfection in ESI discovery. *The*
20 *Pension Comm. Of the Univ. of Montreal Pension Plan v. Banc of Am.*
21 *Securities, LLC*, 685 F.Supp.2d 456, 461 (S.D.N.Y.); *see also* Advisory
22 Committee Notes to proposed new Rule 37(e) (noting that “perfection in
23 preserving all relevant electronically stored information is often
24 impossible,” and “[t]his rule recognizes that reasonable steps’ to

1 preserve suffice; it does not call for perfection.”). The touchstone of
 2 discovery of ESI is reasonableness. (*Id.*). However, as one court noted,
 3

4 If litigants are to have any faith in the discovery
 5 process, they must know that parties cannot fail to
 6 produce highly relevant documents within their
 7 possession with impunity. Parties cannot be permitted
 8 to jeopardize the integrity of the discovery process by
 9 engaging in halfhearted and ineffective efforts to
 10 identify and produce relevant documents.
 11

12 *Bratka v. Anheuser-Busch Co., Inc.*, 164 F.R.D. 448, 463 (S.D. Ohio
 13 1995). “Litigation is not a game. It is the time-honored method of
 14 seeking the truth, finding the truth, and doing justice.” *Haeger v.*
 15 *Goodyear Tire & Rubber Co.*, --F.3d--, 6 n.1 (9th Cir. July 20, 2015)
 16 (quoting *Haeger v. Goodyear Tire and Rubber Co.*, 906 F.Supp.2d 938,
 17 941 (D. Ariz. 2012)).

18 **B. Analysis**

19 The Court notes that, on August 3, 2015, the parties filed a joint
 20 notice that they are in the process of finalizing a settlement. (ECF No.
 21 416). The Court’s decision to impose sanctions under Rule 26(g)(3)
 22 outlives the anticipated settlement and voluntary dismissal of the case.
 23 *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395 (1990); *Haeger v.*
 24 *Goodyear Tire & Rubber Co.*, --F.3d--, *18-19, No. 12-17718 (9th Cir.
 25 July 20, 2015); *In re Exxon Valdez*, 102 F.3d 429, 431 (9th Cir. 1996);
Greenberg v. Sala, 822 F.2d 882, 885 (9th Cir. 1987); *Heinrichs v.*
Marshall and Stevens, Inc., 921 F.2d 418, 420-421 (2d Cir. 1990);
Fosselman v. Gibbs, No. C 06-0375-PJH-PR, 2010 WL 1008264, *4 (N.

1 D. Cal. March 18, 2010), *aff'd*, 473 Fed. Appx. 639 (9th Cir. 2012). Even
 2 if Plaintiff were to withdraw its motion for sanctions under Rule 37,
 3 which it did not do in the notice of settlement or at the hearing, (ECF
 4 Nos. 416, 419), the Court is required to impose sanctions for Rule 26(g)
 5 violations made without substantial justification. FED. R. CIV. P.
 6 26(g)(3); *Chambers, supra*, 501 U.S. at 51.

7 **1. Rule 26(g)**

8 The point of Rule 26(g) is to hold someone personally responsible
 9 for the completeness and accuracy of discovery responses. Rule 26(g)
 10 requires a signature by a party or its counsel on discovery responses
 11 and objections, certifying "that to the best of the person's knowledge,
 12 information, and belief *formed after a reasonable inquiry*" the response
 13 or objection is "consistent with these rules and warranted by existing
 14 law" and "not interposed for an improper purpose, such as to harass,
 15 cause unnecessary delay, or needlessly increase the cost of litigation.
 16 FED. R. CIV. P. 26(g)(1) (emphasis added). Here, both Defendant
 17 Noorian and attorney Thomas O'Leary certified discovery responses on
 18 behalf of Defendant RFT that were false, misleading, and made without
 19 first conducting a reasonable inquiry.

20 Defendant Noorian knew, from his own personal involvement and
 21 from his review of the documents he requested from Mark Sullivan in
 22 December 2012, that responsive documents existed, but nevertheless
 23 signed discovery responses denying the existence of those documents.
 24 Defendant RFT, through its representative Noorian, also falsely signed
 25 discovery responses, thereby denying documents that it knew or should

1 have known existed. Attorney Thomas O'Leary signed discovery
2 responses without conducting a reasonable inquiry as required by Rule
3 26. There can be no doubt that Defendants and their attorneys failed to
4 make reasonable inquiries, because Defendants' lead attorneys were
5 able to identify masses of responsive ESI in September and December
6 when they finally inquired of their vendors about the ESI. These
7 improper certifications contributed to the concealment of documents
8 that were relevant and favorable to Plaintiff, caused unnecessary delay
9 and needlessly increased the cost of litigation.

10 **a. Document Request No. 23**

11 **i. Request**

12 Request No. 23 sought documents concerning "the creation,
13 receipt, use, publication and/or distribution of the DOCUMENT entitled
14 'HM Electronics IQ Structural Failures.'" (ECF No. 268-15 (Exh. 11) at
15 16).

16 **ii. Response**

17 Defendant asserted objections and then falsely stated that it "may
18 have responsive documents, but is uncertain at this time." (ECF No.
19 268-15 (Exh. 11) at 16). Attorney O'Leary signed this response on
20 October 16, 2013. (ECF No. 268-27 (Exh. 11) at 10).

21 **iii. Why Response Was False When Signed**

22 As of the date Mr. O'Leary signed this response, Defendants knew
23 that they had documents concerning the creation, receipt, use, and
24 distribution of the Structural Failures Report. Defendant RFT's CEO,
25 Noorian, had reviewed Mr. Sullivan's email and zip file containing these

1 very documents on December 6, 2012, as he admitted two years later
2 during a deposition on December 18, 2014. In his June 11, 2014,
3 deposition, Defendant Noorian testified that he was aware of the
4 Structural Failures Report as of June 5, 2012. Mr. Noorian and many
5 other RFT executives and marketing personnel participated in emails
6 guiding the creation of the Structural Failures Report. (*See e.g.*, ECF
7 No. 268-21 (Exh. 14) at 5 (May 5, 2012 email from Mark Sullivan to
8 Philip Tondelli, Scott Crause, Scott Richardson, Jim Voiner, Michael
9 Murdock, with courtesy copy to Michelle Greenwood, Bob Noorian, Tony
10 DeLise, Emilio Roman, Lauren Lenartowski, Fiona Noorian, Jennifer
11 Morales, Barb Heimkamp, and Kay Prosser discussing creation and
12 planned distribution of Structural Failures Report) and ECF No. 288-6
13 (Exh. 16) (Noorian Deposition acknowledging receipt of several similar
14 emails)). Defendant also should have reviewed its ESI for production in
15 the 10 months since the action had been filed on December 5, 2012.

16 **iv. Inquiry Attorneys Should Have Made**

17 Attorney O’Leary would have known responsive documents
18 existed had he made a reasonable inquiry. At the hearing, attorneys
19 O’Leary and Vanderhoof of LeClairRyan LLP argued primarily that it
20 was reasonable to rely on Mr. Noorian’s assertions. They also asserted
21 that it would not have been reasonable to have reviewed all of the ESI
22 at that time.

23 On October 16, 2013, when Mr. O’Leary signed this response to
24 request for document production, the attorneys had not even collected,
25 much less reviewed Defendant RFT’s documents. The evidence in the

1 record shows that Defendant RFT collected ESI in November 2013,
2 after attorney O'Leary had already signed the responses in October
3 2013, that Mr. O'Leary did not give the data for processing to the ESI
4 vendors until March 2014, and that the processed data was not
5 returned by the vendors for the attorneys to review until after April
6 2014.

7 The Advisory Committee Notes on Rule 26(g) explain “the
8 signature certifies that the lawyer has made a reasonable effort to
9 assure that the client *has provided* all the information *and documents*
10 available to him that are responsive to the discovery demand.” FED. R.
11 CIV. P. 26, subdivision (g) Advisory Committee Notes (1980
12 Amendment) (emphasis added). At the time Mr. O'Leary signed this
13 response, he had made no effort to assure that Defendant RFT had
14 provided all the documents to the attorneys. The attorneys did not
15 describe what documents they reviewed at the meeting before the initial
16 responses were signed, how those documents were selected, by whom, or
17 why (or whether) they believed those documents to be representative of
18 the ESI. In the court-ordered meet and confer on February 27, 2014, in
19 response to Plaintiff's question about the methodology used to collect
20 documents in light of the small amount of responsive documents
21 produced, Mr. O'Leary explained simply “I didn't conduct the ESI
22 search, so I don't know the methodology. They were told to look for
23 documents on their computer.” (ECF No. 268-27 (Exh. 17) at 23).

24 Although Mr. O'Leary was not required to review every single
25 page of the ESI before signing the written discovery responses, it was

1 not reasonable for him to sign the document production responses
2 before the ESI was even collected. The Court recognizes that Mr.
3 O'Leary and his firm did not substitute into the case as lead counsel
4 until one month before signing these responses. Nevertheless, Mr.
5 O'Leary and his firm should have been more transparent with
6 Plaintiff's attorneys about the data collection process and the amount of
7 data involved. Defendant's attorneys should have sought an extension
8 of the time to respond to discovery responses so that the document
9 collection and some sampling could occur prior to certifying responses.
10 Defendant could have filed a motion for protective order or an ex parte
11 discovery motion seeking to extend the time to respond detailing the
12 large amount of ESI, the time and technology constraints, and the
13 Defendant's proposed collection and processing methodology. Instead of
14 familiarizing himself with his client's ESI and embracing transparency
15 and collaboration in the discovery process, lead counsel chose to sign
16 false discovery responses without making any efforts to assure that the
17 responses accurately reflected the Defendant's documents.

18 It was also not reasonable to sign discovery responses denying the
19 existence of documents based solely on Defendant Noorian's word.
20 While the Advisory Committee Notes on Rule 26(g) do provide that "the
21 attorney may rely on assertions by the client" in making a reasonable
22 inquiry, that is true only "as long as that reliance is appropriate under
23 the circumstances." FED. R. CIV. P. 26, subdivision (g) Advisory
24 Committee Notes (1980 Amendment). Asking Mr. Noorian and
25 accepting his response without asking other employees or collecting or

1 sampling documents was not reasonable. The attorneys did not explain
2 what questions they asked Mr. Noorian and the other managers at the
3 pre-response meeting, identify which managers were present, or explain
4 why those particular managers were selected rather than other
5 employees to discuss the existence of responsive documents. The
6 attorneys did not say whether they asked any of the other managers at
7 their meetings about these documents and how they responded—a
8 critical point, because there were many other executive level RFT
9 employees besides Noorian who knew responsive documents existed.
10 The attorneys should have asked Philip Tondelli, Steve Crause, Steve
11 Combs, Helen Fansler (Executive Assistant), and Fiona Noorian (all of
12 whom were high level employees privy to responsive emails) whether
13 they knew of the existence of documents. The attorneys could have
14 identified these custodians by virtue of their positions, even without the
15 benefit of reviewing any of the responsive documents. Even if
16 Defendant Noorian lied to his attorneys or forgot about the existence of
17 documents, a reasonable inquiry made to any of these other custodians
18 would have revealed the existence of responsive documents.

19 **b. Document Request No. 26**

20 **i. Request**

21 Request No. 26 sought documents between RFT and Panasonic
22 about the Structural Failures Report. (ECF No. 268-15 (Exh. 11) at 16-
23 17).

24

25

1 **ii. Response**

2 Defendant RFT rested on a relevancy objection in refusing to
 3 provide documents in response to Request No. 26 for documents
 4 between RFT and Panasonic about the Structural Failures Report. (*Id.*
 5 at 16-17). Attorney O'Leary signed this response on October 16, 2013.
 6 (ECF No. 268-27 (Exh. 11) at 10).

7 **iii. Why Response Was False When Signed**

8 The relevancy objection, signed by Thomas O'Leary on October 16,
 9 2013, was meritless, because the distribution of the Structural Failures
 10 Report to Panasonic by RFT is central to Plaintiff's trade libel claim as
 11 alleged in the Complaint filed on December 5, 2012. The relevance of
 12 the distribution of the Report is so obvious that Defendant Noorian sent
 13 an email to Mark Sullivan instructing him to stop distributing and
 14 destroy the Report in December 2012, soon after Defendant Noorian
 15 reviewed the Complaint on December 5, 2012.

16 **iv. Supplemental Response**

17 In December 2013 Defendant supplemented: "Responding Party
 18 has produced documents responsive to this Request." (*Id.* at 3).
 19 Defendant Noorian signed this response on December 5, 2013 and
 20 attorney O'Leary signed this response on December 12, 2013.

21 **v. Why Supplemental Response Was False
 22 When Signed**

23 Although Defendant had produced some documents by mid-
 24 December 2013, it did not produce the most pertinent documents, as
 25 made apparent by the documents Defendant produced from September

1 2014, through April 2015, following discovery of the search
2 term/privilege review and data export errors. In fact, as of December
3 12, 2013, Defendant had only produced 1004 pages of hard copy
4 documents and Mr. O'Leary had not even provided Defendant's ESI to
5 the ESI vendors for processing, much less reviewed it to determine
6 whether any responsive documents remained to be produced.

7 **vi. Inquiry Attorneys Should Have Made**

8 Lead counsel should not have certified that all responsive
9 documents had been produced before looking at the client's ESI data.
10 Although lead counsel was not required to examine each page of ESI
11 prior to signing this response, he or his delegates should have sampled
12 the ESI and let Plaintiff's counsel and the Court know that the
13 representation that all responsive documents had been produced was
14 based on a sampling, and informed them of the sampling methodology
15 used. Alternatively, lead counsel could have sought an extension based
16 on a detailed explanation of the proposed methodology and the
17 technological and time constraints necessitating extension.

18 **c. Document Request No. 28**

19 **i. Request**

20 Request No. 28 sought documents concerning RFT's "opinions,
21 statements, and/or declarations regarding the repair frequency of any
22 HME drive-thru product, for the period January 1, 2005 to the present."
23 (ECF No. 268-16 (Exh. 11) at 1).

24

25

1 **ii. Response**

2 Defendant RFT asserted objections and refused to produce
 3 responsive documents on the basis that “it could be thousands of
 4 documents every year.” Attorney O’Leary signed this response on
 5 October 16, 2013. (ECF No. 268-16 (Exh. 11) at 1).

6 **iii. Why This Response Was Improper**

7 This was an improper certification because neither Defendant nor
 8 its attorneys had made any inquiry into whether responsive documents
 9 existed or how many responsive documents existed at the time Mr.
 10 O’Leary signed the response. The failure to make a reasonable inquiry
 11 is patent from the speculative phrase (“could be thousands...”) used. On
 12 the date Mr. O’Leary signed this response, Defendant’s ESI had not
 13 been collected or reviewed. Defendant was collecting ESI as late as
 14 November 2013—one month after this was signed, and Mr. O’Leary did
 15 not task the ESI vendor with processing Defendant’s ESI until March
 16 2014—several months later. Rather than sign this discovery response
 17 refusing to produce documents based on speculation about what their
 18 volume might be, Mr. O’Leary should have familiarized himself with his
 19 client’s data structures and engaged with Plaintiff’s counsel and the
 20 court in meaningful, collaborative discussions about the volume of ESI,
 21 the ESI production methodology, and the timetable required.

22 **iv. Supplemental Response**

23 Defendant’s December 2013 supplemental response stated
 24 “Responding Party has no documents responsive to this request.” (ECF
 25 No. 268-19 (Exh. 12) at 4-5). Defendant Noorian certified this response

1 on December 5, 2013, and attorney O'Leary signed the response on
 2 December 12, 2013.

3 **v. Why Supplemental Response Was False**
 4 **When Signed**

5 Defendant's response that it had no documents concerning RFT's
 6 "opinions, statements, and/or declarations regarding the repair
 7 frequency of any HME drive-thru product" was false. Mark Sullivan
 8 produced emails showing Defendant Noorian knew of such documents
 9 no later than December 6, 2012, at his April 1, 2014, deposition. During
 10 Defendant Noorian's June 11, 2014, deposition, he admitted that he was
 11 aware of the Structural Failures Report and internal emails containing
 12 opinions and statements about HME's repair frequency as of June 5,
 13 2012. (ECF No. 288-6 (Exh. 16) at 5-6). From September 2014, through
 14 April 2015, after discovery of the search term/privilege review and data
 15 export errors, Defendant produced hundreds of responsive documents.
 16 The late-produced documents and Defendant Noorian's limited purpose
 17 deposition show Defendant Noorian knew this response was false when
 18 he signed it on December 5, 2013, because he had personally reviewed
 19 Mark Sullivan's December 6, 2012, email and zip file containing
 20 responsive documents one year earlier.

21 **vi. Inquiry Attorneys Should Have Made**

22 As explained in the preceding sections, Mr. O'Leary's reliance on
 23 Defendant Noorian's assertions was not reasonable under the
 24 circumstances. Mr. O'Leary should have identified other key employees
 25 and asked them whether responsive documents existed. As Defendant

1 Noorian himself admitted during the limited purpose deposition, he
2 cannot control 60 employee's behavior. While Mr. O'Leary did not have
3 to ask every employee whether they had made such statements in
4 writing, it was unreasonable to only ask one person. A reasonable
5 inquiry would have involved asking a few key employees, including at
6 least one marketing employee. Mr. O'Leary also should have made sure
7 at least some sampling of ESI was reviewed before certifying that no
8 responsive documents existed. So certifying before the ESI had even
9 been processed, much less sampled or reviewed, was not reasonable.

10 **d. Interrogatory No. 13**

11 **i. Request**

12 Interrogatory No. 13 demands: "identify all persons to whom you
13 provided the 'HM Electronics IQ Structural Failures' document or any
14 of the contents set forth therein." (ECF No. 268-11 (Exh. 8) at 6).

15 **ii. Response**

16 Defendant RFT objected and stated that Mark Sullivan, who was
17 no longer employed with RFT, could identify such persons. (*Id.* at 6).
18 Defendant Noorian signed the interrogatory responses under penalty of
19 perjury on October 18, 2013, and attorney O'Leary signed the discovery
20 responses on October 16, 2013. (*Id.* at 9, 10).

21 **iii. Why This Response Was False**

22 This response was false because Defendant could have identified
23 the recipients and knew that Mark Sullivan was not the only person
24 who could do so. The ESI productions by RFT from September 2014,
25 through April 2015, included emails that RFT had at the time and could

1 have used to compile a list of recipients or produced in lieu of compiling
2 a list. ESI also showed that Defendants knew Mark Sullivan was not
3 the only RFT employee who distributed the Report. (ECF No. 288-16
4 (Exh. 34)). The documents show Defendant Noorian attended a July
5 2012 meeting, and that Defendant Noorian personally reviewed Mark
6 Sullivan's documents showing distribution in December 2012. Despite
7 acquiring knowledge of responsive documents in July and December
8 2012, Defendant Noorian signed the interrogatory responses under
9 penalty of perjury.

10 **iv. Supplemental Response**

11 Defendant also supplemented these responses after Plaintiff
12 challenged their sufficiency. (ECF No. 268-12 (Exh. 9)). Defendant
13 Noorian signed the supplemental responses on December 5, 2013, and
14 James C. Hildebrand signed them for Thomas O'Leary on December 12,
15 2013. (*Id.*). Defendant revised Interrogatory No. 13 to insist that
16 "Mark Sullivan is the only person with knowledge to whom, if anyone,
17 the 'HM Electronics IQ Structural Failures' document was distributed."
18 (*Id.* at 6).

19 **v. Why The Supplemental Response Was False**

20 Mark Sullivan was not the only person with knowledge of to whom
21 the Report had been distributed, and Defendants Noorian and RFT
22 knew it at the time this supplemental response was signed. Many RFT
23 executives and employees, including Noorian, had knowledge to whom
24 the Report was distributed as a result of participation in the July 3,
25 2012, Panasonic meeting. Defendant Noorian and Helen Fansler also

1 knew of its distribution from Defendant Noorian's review of Mark
2 Sullivan's December 2012, email and zip file. Michael Murdock, RFT's
3 Regional Sales Manager, also had knowledge of the Report recipients,
4 because he personally emailed the Report to at least one prospect.
5 (ECF No. 288-16 (Exh. 34)).

6 **vi. Inquiry Attorneys Should Have Made**

7 Before certifying these responses stating that only Mark Sullivan
8 could identify the recipients of the Report, lead counsel should have
9 asked other RFT employees besides Defendant Noorian, including at
10 least one marketing employee. The attorneys also should have
11 conducted an initial review or sampling of documents. The attorneys
12 also should have worked with opposing counsel and the court in a
13 transparent and collaborative manner to obtain an extension of time to
14 adequately review documents.

15 **e. Interrogatory No. 20**

16 **i. Request**

17 Interrogatory No. 20 requested: "identify all person(s) with
18 Panasonic who may have knowledge regarding the content and
19 distribution of the 'HM Electronics IQ Structural Failures' document."
20 (ECF No. 268-11 (Exh. 8) at 8-9).

21 **ii. Response**

22 On October 16, 2013, RFT's lead counsel Thomas O'Leary signed
23 interrogatory responses that included only objections in response to this
24 request. (*Id.* at 9). Defendant objected that the request was vague,
25 ambiguous and burdensome, that it sought irrelevant information, and

1 that it sought information in the control of third parties and not
2 available to Defendant.

3 **iii. Why This Response Was Improper**

4 These objections were frivolous and false when made. The
5 identity of Panasonic employees who had knowledge of the Report was
6 relevant to the action, and this interrogatory was an appropriate way
7 for Plaintiff to identify who at Panasonic—a large company and one of
8 Plaintiff's competitor's—might have discoverable information.
9 Defendant's objection that the information was not available to it was
10 false, and it knew that response to be false when made. Noorian and
11 other RFT employees had such knowledge from their direct
12 participation in the July 3, 2012, meeting with Panasonic and post-
13 meeting emails, as shown by a July 16, 2012, email produced on
14 September 26, 2014. (ECF No. 288-7 (Exh. 21)).

15 **iv. Supplemental Response**

16 Defendant doubled-down on its response to Interrogatory No. 20,
17 supplementing that RFT "is unaware of any person at Panasonic who
18 may have knowledge regarding the content and distribution of the 'HM
19 Electronics IQ Structural Failures' document." (ECF No. 268-12 (Exh.
20 9) at 7). The supplemental response was signed by Defendant Noorian
21 on December 5, 2013, and by James Hildebrand for Thomas O'Leary on
22 December 12, 2013. (Id. at 7-8).

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1 **v. Why The Supplemental Response Was False**
2 **and Made Without Reasonable Inquiry**

3 That statement was also false. Noorian and other RFT employees
4 had knowledge from their direct participation in the July 3, 2012,
5 meeting with Panasonic and post-meeting emails, as shown by a July
6 16, 2012, email produced on September 26, 2014. (ECF No. 288-7 (Exh.
7 21)).

8 **vi. Inquiry Attorneys Should Have Made**

9 Mr. O'Leary's certification was made without reasonable inquiry.
10 Before certifying these responses stating that only Mark Sullivan could
11 identify the recipients of the Report, lead counsel should have asked
12 other RFT employees besides Defendant Noorian, and should have
13 asked at least one marketing employee. The attorneys also should have
14 conducted an initial review or sampling of documents. The attorneys
15 also should have worked with opposing counsel and the court in a
16 transparent and collaborative manner to obtain an extension of time to
17 adequately review documents.

18 **f. Interrogatory No. 23**

19 **i. Request**

20 Interrogatory No. 23 called for Defendants to identify the
21 participants, date, and location of any meetings from January 1, 2012,
22 to the present between RFT and Panasonic where HME was discussed.
23 (ECF No. 288-8 (Exh. 22) at 9).

ii. Response and Supplemental Response

At first, Defendants provided only frivolous objections, and then supplemented this response in August 2014, by insisting that only Mark Sullivan and Lillia Tuschuk had knowledge of any meetings, if any occurred. (ECF No. 269-2 (Exh. 23) at 10-11). The responses were signed July 9, 2014, by Defendant Noorian and attorney Thomas O’Leary. (ECF No. 288-8 (Exh. 24)). The supplemental responses were signed by Defendant Noorian on August 22, 2014, and by attorney O’Leary on August 21, 2014. (ECF No. 269-2 (Exh. 23) at 10-11).

iii. Why Responses Were False

In fact, Defendant Noorian himself attended at least one such meeting with Panasonic on July 3, 2012, along with Philip Tondelli, Mark Sullivan, Michelle Greenwood, and Allen Hege of RFT. (ECF No. 288-7 (Exh. 21)). This meeting only came to light when Defendant finally produced an email chain exposing the meeting on September 26, 2014. (*Id.*). The email was distributed amongst Michelle Greenwood, Philip Tondelli, Michael Murdock, Mark Sullivan, and Panasonic personnel on July 16, 2012. (*Id.*). The attachments summarize the meeting, list the participants, note Defendant Noorian's direct participation in the meeting, describe discussions about Plaintiff's headset repair rates, durability, and quality, and note that Mr. Sullivan provided and discussed a document, the description of which matches the Structural Failures Report. (*Id.*).

Before this Court, at the hearing on the instant motions, Defendants' attorneys asserted that Defendant Noorian did not

1 remember this meeting at the time, and that he only attended the first
2 few minutes of the meeting. Defendants did not offer a declaration from
3 Noorian attesting to these statements. Even if Defendant Noorian only
4 attended a few minutes of this meeting, that does not excuse Defendant
5 or its attorneys from consulting other high level executives, marketing
6 employees, or document custodians to determine if RFT had attended
7 such meetings through employees besides Mr. Noorian. The response
8 was false when made, and a reasonable inquiry of other key RFT
9 employees would have revealed the truth.

10 **g. Offensive Use of False Discovery Responses**

11 Defendants and their attorneys also used the false discovery
12 certifications as a weapon to ward off further inquiry into the
13 sufficiency of the document production. For instance, in its April 14,
14 2014, opposition to Plaintiff's motion to compel further production of
15 documents, Defendant argued:

16 For several of HME's document requests, RFT's
17 counsel has also unequivocally indicated that it does not
18 possess responsive documents. In other words, RFT
19 cannot produce documents it does not have. ...RFT has
20 conducted multiple diligent electronic searches, has
21 scavenged for numerous documents, and has run several
22 reports in order to provide HME with responsive
23 documents.

24 (ECF No. 125 at 5, 6:20-26). There can be no question now that the
25 false responses and improper objections were interposed for the
improper purpose of concealing these critical documents, causing

1 unnecessary delay, or increasing the cost of litigation, and were made
2 without anything remotely approaching “reasonable inquiry.”³

3 **h. Sanctions Are Warranted**

4 Had Defendant correctly answered these discovery requests,
5 Plaintiff would have been able to root out the non-production of the
6 email confirming the meeting earlier during discovery. Defendants and
7 their attorneys, by certifying these improper responses, concealed the
8 existence of documents that they knew or should have known existed,
9 causing unnecessary delay and needlessly increasing the cost of
10 litigation.

11 The Court finds that it must impose appropriate sanctions against
12 Defendants Noorian and RFT for improper certifications of the following
13 responses: Request for Production of Documents Responses Nos. 25, 26
14 and 28; Interrogatory Responses 13, 20 and 23. Further, the Court
15 must impose appropriate sanctions against attorney Thomas O’Leary
16 and Defendant RFT for improper certifications of the following
17 responses: Requests for Production Responses Nos. 23, 25, 26 and 28;
18 Interrogatories Nos. 13, 20 and 23.

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³ Defendant’s use of the improperly certified discovery responses to
24 conceal documents and evade sanctions was an abuse of discovery and
25 fraud upon the court. Though Rule 11 sanctions may be warranted for
this and similarly false filings noted herein, the Court declines to
consider Rule 11 sanctions in this instance.

1 **2. Rule 37**

2 **a. Current Rule 37**

3 When considering sanctions under Rule 37, courts generally
 4 consider three factors: “(1) the degree of fault of the party who altered
 5 or destroyed the evidence; (2) the degree of prejudice suffered by the
 6 opposing party; and (3) whether there is a lesser sanction that will
 7 avoid substantial unfairness to the opposing party.” *Apple v. Samsung*,
 8 888 F.Supp.2d 976, 992 (N.D. Cal. 2012) (“*Apple II*”).

9 As Rule 37 is currently applied in the Ninth Circuit, “a party's
 10 destruction of evidence need not be in ‘bad faith’ to warrant a court's
 11 imposition of sanctions.” *In re Napster, Inc. Copyright Litigation*, 462
 12 F.Supp.2d 1060, 1066 (9th Cir. 2006) (citing *Glover v. BIC Corp.*, 6 F.3d
 13 1318, 1329 (9th Cir. 1993)). District courts may impose sanctions
 14 against a spoliating party that merely had “simple notice of ‘potential
 15 relevance to the litigation.’” *Glover*, 6 F.3d at 1329 (quoting *Akiona v.*
 16 *United States*, 938 F.2d 158, 161 (9th Cir. 1991)).

17 **i. Fault**

18 **a. Failure to Implement Litigation Hold**

19 Attorneys have a duty to effectively communicate a “litigation
 20 hold” that is tailored to the client and the particular lawsuit, so the
 21 client will understand exactly what actions to take or forebear, and so
 22 that the client will actually take the steps necessary to preserve
 23 evidence. *The Pension Comm.*, *supra*, 685 F.Supp.2d at 462; *Philips*
 24 *Electronics North America Corp. v. BC Technical*, 773 F.Supp.2d 1149,
 25 1195, 1204-1206 (D. Utah 2011) (litigation hold must be directed to

1 appropriate employees, must be conveyed in a manner that ensures
 2 recipients read and follow it, must tell them what the case is about, and
 3 must identify categories of documents to be preserved).

4 Indeed, the Advisory Committee Notes on the proposed new Rule
 5 37(e) advises “[i]t is important that counsel become familiar with their
 6 clients’ information systems and digital data—including social media—
 7 to address [preservation issues].” The attorney must learn their client’s
 8 organizational structure and computer data structure in order to
 9 adequately advise the client of the duty and method for preserving
 10 evidence. *See, e.g., Qualcomm Inc. v. Broadcom Corp.*, No. 05CV1958-
 11 B-BLM, 2010 WL 1336937, at *2-*3 (S.D. Cal. Apr. 2, 2010). After a
 12 litigation hold has been implemented, counsel has a continuing duty to
 13 monitor a client’s compliance with a litigation hold. *Zubulake v.*
 14 *Warburg, LLC*, 229 F.R.D. 422, 423 and 431-432 (S.D.N.Y. 2004)
 15 (*Zubulake V*).

16 The State Bar of California recently issued a Formal Opinion that
 17 advises: “Prompt issuance of a litigation hold may prevent spoliation of
 18 evidence, and the duty to do so falls on both the party and the outside
 19 counsel working on the matter.” California State Bar Formal Opn. No.
 20 2015-193 at 3 n.6. Though the opinion is new, the principles and
 21 guidance in the opinion are not new. The Opinion summarizes,

22 Attorneys handling e-discovery should be able to
 23 perform (either by themselves or in association with
 24 competent counsel or expert consultants) the following:

- 25 • Initially assess e-discovery needs and issues, if any;

- 1 • *Implement/cause to implement appropriate ESI*
2 *preservation procedures;*
- 3 • *Analyze and understand a client's ESI systems and*
4 *storage;*
- 5 • *Advise the client on available options for collection*
6 *and preservation of ESI;*
- 7 • *Identify custodians of potentially relevant ESI;*
- 8 • Engage in competent and meaningful meet and
9 confer with opposing counsel concerning an e-
10 discovery plan;
- 11 • Perform data searches;
- 12 • *Collect responsive ESI in a manner that preserves*
13 *the integrity of the ESI; and*
- 14 • Produce responsive non-privileged ESI in a
15 recognized and appropriate manner.

16 *Id.* at 3-4 (emphasis added).

17 Defendants' attorneys ignored these basic principles. Defendants'
18 attorneys apparently never sent Defendants a "litigation hold" letter—
19 much less one tailored to the data and organizational structures of this
20 client. Defendants' lead counsel never learned the infrastructure of the
21 Defendant's ESI nor advised Defendants on the proper methodology for
22 searching ESI, and did not monitor compliance. Defendant Noorian and
23 Mr. O'Leary should both have been key players in data collection, yet
24 both claim to have had no involvement in gathering ESI. To the extent
25 lead counsel chose to delegate its data preservation and litigation hold
duties, it was incumbent on lead counsel to supervise the employees and
attorneys to whom those duties were delegated. *See, e.g., id.* at 5
(describing duty to supervise delegates).

1 Yet, even after the client was ordered to conduct an ESI search,
2 and while assuring the court and opposing counsel that an ESI search
3 had occurred, Thomas O’Leary could not answer simple questions about
4 the ESI search methodology used. (ECF No. 268-27 (Exh. 17) at 23).
5 Worse, he disavowed any involvement or knowledge of the search
6 methodology. (*Id.*). It is no surprise Mr. O’Leary could not answer
7 questions about the ESI search methodology used; it had not even
8 begun. It was not until the next month that Mr. O’Leary himself tasked
9 the vendor who later performed the ESI searches. The record shows
10 that lead counsel remained hands-off while and after the ESI searches
11 occurred. And there is nothing in the record to suggest Defendants’
12 attorneys ever instructed Defendants to not destroy documents that
13 could be relevant to this action. The attorneys’ total abdication of their
14 obligation to communicate the duty to preserve evidence to their clients
15 in an effective manner warrants severe sanctions.

b. Intentional Destruction of ESI

17 It is well established that litigants must preserve all potentially
18 relevant records as soon as they become aware that a case may be filed.
19 See e.g., *Zubulake v. UBS Warburg LLC*, 2003 WL 22410619, *2
20 (S.D.N.Y. October 22, 2003) (*Zubulake IV*); *Zubulake V*, *supra*, 229
21 F.R.D. 422; *Philips Electronics North America Corp.*, *supra*, 773
22 F.Supp.2d at 1195; *Thompson v. U.S. Dept. of Housing and Urban*
23 *Development*, 219 F.R.D. 93, 99-100 (D. Md. 2003). Defendants do not
24 dispute—and the evidence shows—that after learning about this

1 lawsuit, Defendants specifically instructed employees to destroy highly
 2 relevant documents because of their relevance to Plaintiff's claims.

3 Defendants argue that the spoliation was not intentional. They
 4 contend that "RFT produced over 1 million pages of information," and
 5 the "small fraction of that information that was produced recently does
 6 not support inferences of misconduct." (ECF No. 288 at 56:3-5).

7 Defendants' exaltation of form over substance is misguided. "Producing
 8 1.2 million pages of marginally relevant documents while hiding 46,000
 9 critically important ones does not constitute good faith and does not
 10 satisfy either the client's or attorney's discovery obligations."

11 *Qualcomm Inc. v. Broadcom Corp.*, No. 05cv1958-B-BLM, 2008 WL
 12 66932, at *1 (S.D. Cal. Jan. 7, 2008), *vacated in part*, No. 05cv1958-
 13 RMB-BLM, 2008 WL 638108 (S.D. Cal. Mar. 5, 2008). The volume of
 14 Defendants' production does not relieve them of fault.

15 Defendants also claim that they are not at fault because
 16 Defendant Noorian did not really mean "destroy," but instead meant
 17 that his sales force should stop distributing the document outside of the
 18 company. Defendants' contention contradicts the unequivocal command
 19 in Defendant Noorian's email. Though Defendant Noorian also stated
 20 that he did not "want anyone at RFT using the HME failure pictures
 21 effective immediately," that does not negate the mandate to "destroy
 22 any electronic or printed copies any of you may have" that followed.

23 The only support for Defendants' position is Defendant Noorian's
 24 self-serving interpretation delivered during the limited purpose
 25 deposition held after this motion was filed. Defendant Noorian could

1 not explain during deposition why he issued the “destroy” command
2 when it would have been just as easy and effective to issue an
3 instruction to stop distributing the documents. Defendants’ testimony
4 that Defendant Noorian’s motive was “to make sure the ‘damn thing’
5 wasn’t sent out again,” is also inconsistent with a Panasonic marketing
6 employee’s testimony, delivered by a disinterested party before the
7 issue of sanctions arose, that Defendants never requested that
8 Panasonic stop distributing the materials. (ECF No. 288 at 63; ECF
9 No. 288-4 (Exh. 7) 14:18-22). If Defendants’ intention was to curtail the
10 distribution of the Report, as opposed to intentionally destroying
11 relevant evidence, then it follows that they would have asked Panasonic
12 to stop distributing the Report.

13 Moreover, Defendant Noorian approved Mr. Sullivan’s act of
14 letting “the other guys know” to destroy the documents. And Defendant
15 Noorian never clarified his intention to the employees who received the
16 instruction. As a result, Mark Sullivan instructed Philip Tondelli and
17 Michael Murdock both to “destroy our copies of this *and* do not send it
18 out for any further reasons.” (ECF No. 288-15 (Exh. 33) (emphasis
19 added)). All of this occurred on December 19, 2012, after the duty to
20 preserve evidence arose.

21 Even setting aside whether Defendant Noorian actually intended
22 that documents be destroyed, the sales force would not have understood
23 his unambiguous command as anything less than a directive to destroy
24 the Structural Failures Report and related documents. There is
25 nothing to suggest the sales staff failed to carry out the “destroy”

1 command in this instance. Defendants do not offer a declaration from
2 employees stating that they did not delete emails, or they only deleted
3 certain types of documents. There is also nothing in the record to
4 suggest Defendant Noorian made any attempt to modify or retract the
5 “destroy” instruction. There is no evidence that the employees had been
6 advised of a litigation hold. Defendants have produced no evidence to
7 support their speculation that only duplicate copies of the Structural
8 Failures Report were deleted. The Court concludes that Defendant
9 Noorian intended for RFT’s sales force to destroy relevant documents.

10 Finally, the evidence shows that Defendants have not ever
11 produced a complete version of the attachments to the December 6,
12 2012, Mark Sullivan email, and Defendants have not been able to
13 identify all of the documents referenced in the five screen shots. The
14 absence of these documents, combined with the surrounding
15 circumstances, raises the reasonable inference that Defendants deleted
16 other documents including or referencing the HME failure pictures that
17 are relevant to this action and favorable to Plaintiff. This Court
18 concludes that Defendants deleted relevant evidence intentionally and
19 in bad faith.

20 **c. Withholding Non-privileged**
21 **Documents As Privileged**

22 It is fundamental that litigants must produce responsive non-
23 privileged documents in a timely manner. Attorneys have a
24 corresponding duty to supervise associates, staff, and contractors who
25 are involved in the document collection, review, and production process.

1 When attorneys employ “keywords or any other technological solution to
 2 ediscovery, *counsel must design an appropriate process*, including use of
 3 available technology, *with appropriate quality control testing*, to review
 4 and produce relevant ESI while adhering to Rule 1 and Rule 26(b)(2)(C)
 5 proportionality.” *Rio Tinto PLC v. Vale S.A.*, 306 F.R.D. 125, 126
 6 (quoting *Da Silva Moore v. Publicis Groupe & MSL Grp.*, 287 F.R.D.
 7 182, 193 (S.D.N.Y.2012)) (emphasis added). The State Bar of
 8 California’s Formal Opinion No. 2015-193 confirms that attorneys have
 9 long had a “duty to supervise the work of subordinate attorneys and
 10 non-attorney employees or agents,” and that this “duty to supervise can
 11 extend to outside vendors or contractors, and even to the client itself.”
 12 California State Bar Formal Opn. No. 2015-193 at 5. The attorneys’
 13 duty to supervise the work of consultants, vendors and subordinate
 14 attorneys is non-delegable. *Id.* “An attorney must maintain overall
 15 responsibility for the work...,” and,

16 must do so by *remaining regularly engaged* in the
 17 expert’s work, by *educating everyone involved in the e-*
discovery workup about the legal issues in the case, the
factual matters impacting discovery, including witnesses
and key evidentiary issues, the obligations around
discovery imposed by the law or by the court, and of any
 20 relevant risks associated with the discovery tasks at
 hand. *The attorney should issue appropriate*
instructions and guidance and, ultimately, conduct
appropriate tests until satisfied that the attorney is
 23 meeting his ethical obligations prior to releasing ESI.

24 *Id.* (emphasis added).

25

1 Counsel must also prepare and provide to opposing counsel a
 2 privilege log if documents are withheld as privileged. FED. R. CIV. P.
 3 26(b)(5)(A); *see also Brown v. Tellermate Holdings Ltd.*, No. 2:11-CV-
 4 1122, 2014 WL 2987051, at *11 (S.D. Ohio July 1, 2014) (noting that
 5 party that failed to produce privilege log had waived all claims of
 6 privilege).

7 The Court finds that sanctions against Defendant RFT and its
 8 attorneys, LeClairRyan LLP and Thomas O’Leary, are appropriate for
 9 this misconduct under Rule 37. Although the Court will not sanction
 10 attorneys Brian Vanderhoof of LeClairRyan LLP and Mark Goldenberg
 11 of Goldenberg Heller Antognoli & Rowland, P.C., their conduct deserves
 12 a dishonorable mention.

13 Though this tardy document production resulted from Defendants’
 14 attorneys’ failure to oversee assisting attorneys, Defendants⁴ share
 15 fault. First, “[a]ny attempt by [the sanctionee] to argue that the district
 16 court abused its discretion in preventing [the sanctionee] from passing
 17 the blame to its attorneys is unavailing. [A sanctionee] ‘is deemed
 18 bound by the acts of its lawyers and is considered to have ‘notice of all

19

20 ⁴ Defendant Noorian objects on the basis that Rule 37 sanctions cannot
 21 be imposed against him personally, because Magistrate Judge
 22 Burkhardt’s order was only issued against Defendant RFT. (ECF No.
 23 185 at 1 (Order); ECF No. 308 at 21 (argument)). Perhaps because
 24 Defendant never raised this argument until the supplemental brief,
 Plaintiff offers no counterpoint. Because the Court finds that
 25 Defendant Noorian can be sanctioned under Rule 26(g)(3), the Court
 does not reach the issue of whether Defendant Noorian can be
 sanctioned under Rule 37.

1 facts, notice of which can be charged upon the attorney.”” *Haeger*,
2 *supra*, --F.3d-- at 25 (quoting *Link v. Wabash R. Co.*, 370 U.S. 626, 634
3 (1962), and citing *Lockary v. Kayfetz*, 974 F.2d 1166, 1169-1170 (9th Cir.
4 1992)). Second, Defendants ignored red flags and signed discovery
5 responses and declarations that contained what turned out to be false
6 and misleading statements about the existence of these documents.

7 Defendant Noorian, on behalf of Defendant RFT, concealed the
8 existence of the missing documents when he verified incorrect written
9 discovery responses denying the existence of some documents, denying
10 that meetings with Panasonic occurred, and identifying Mark Sullivan
11 as the only employee involved in the alleged misconduct. Had
12 Defendant Noorian acknowledged his involvement in the underlying
13 events, Defendants’ attorneys and the court may have been more
14 vigilant when documentation of his involvement did not surface. Also,
15 the evidence shows Defendant Noorian was involved in the collection of
16 documents for production and that he reviewed the very documents
17 Defendants have not been able to find in their production immediately
18 after learning of this lawsuit. Yet he made no effort to ensure that
19 these highly probative documents were produced.

20 When Plaintiff complained that the December 6, 2012, email and
21 zip file from Mark Sullivan to Defendant Noorian had not been
22 produced, Defendants dug in their heels rather than review their
23 production for errors. Steve Combs signed a declaration stating under
24 penalty of perjury that all documents had been produced, even though a
25 cursory investigation would have revealed otherwise.

1 The Court further finds Thomas O’Leary and LeClairRyan LLP
2 responsible for the delayed productions. Defendants’ lead counsel
3 delegated critical discovery tasks, without appropriate monitoring or
4 quality control, to temporarily-involved attorneys who made the
5 unreasonable decision to withhold responsive documents as privileged
6 on the sole basis that they contained words like “confidential,” then
7 compounded the problem by not reviewing the documents withheld as
8 privileged and not creating a privilege log of the excluded documents.
9 Had Defendants’ counsel reviewed even a sample of the documents set
10 aside as privileged the error would have been obvious. It is alarming
11 that lead counsel aggressively defended this fundamentally-flawed ESI
12 production despite Plaintiff’s persistent calls for more documents, a
13 review of methodology, and a privilege log. In addition, the Court is
14 alarmed by Defendants’ counsel’s refusal to take any responsibility for
15 the errors.

16 At the hearing, attorney Vanderhoof argued that LeClairRyan and
17 Mr. O’Leary should not be held responsible for this error, because the
18 paralegals at the temporarily-involved firm did not tell the LeClairRyan
19 attorneys that there were documents that needed review, and there was
20 some chaos caused by the transitioning between firms.

21 This excuse shows LeClairRyan attorneys did not, and still do not,
22 comprehend that it is their duty to become actively engaged in the
23 discovery process, to be knowledgeable about the source and extent of
24 ESI, and to ensure that all gathered data is accounted for, and that
25 these duties are heightened—not diminished—when there is a

1 transition between firms or other personnel critical to discovery. As
2 lead counsel, Thomas O'Leary and LeClairRyan LLP should have asked
3 the paralegals at the temporarily-involved firm about the privilege
4 review, including whether one was conducted, what privilege review
5 methodology was used, the amount and type of documents withheld as
6 privileged, and the updating of the privilege log. Lead counsel should
7 have asked the paralegals about whether there were any additions to
8 the privilege log, which Thomas O'Leary had signed on February 14,
9 2014. (ECF No. 125-3 at 4). When attorney O'Leary signed the
10 privilege log, it had 21 entries, after approximately 18,500 pages had
11 been produced. (ECF No. 125 at 17, 125-13). Lead counsel should have
12 been suspicious that no additional documents were being withheld for
13 privilege after approximately 330,000 pages of ESI were produced,
14 given that the earlier smaller production had resulted in 21 privileged
15 documents.

16 Further, lead counsel was present at Mark Sullivan's and
17 Defendant Noorian's depositions, and should have been surprised and
18 concerned when Plaintiff's counsel used as exhibits documents that
19 Defendants should have had in their ESI but had not produced.

20 Lead counsel also should have noticed that the amount of data Mr.
21 O'Leary provided to the ESI vendors did not approximate the data
22 returned to the attorneys. Lead counsel had access to numbers that
23 they should have noticed did not add up.

24 Plaintiff noticed these red flags and waved them. This shows that
25 the inconsistencies were obvious to anyone paying attention. Plaintiff's

1 protests are yet another flag that Defendants' attorneys should not have
2 ignored. Instead of inquiring further of its vendors, lead counsel
3 chastised Plaintiff for its diligence. The ease with which lead counsel
4 could have discovered this problem is revealed by how quickly and
5 easily the problem was discovered when Mr. Vanderhoof finally did
6 make inquiries to the vendors.

7 Thomas O'Leary of LeClairRyan was the attorney who initially
8 provided the raw ESI to the vendor Setec, and, as lead counsel, it was
9 incumbent on him and his firm to remain involved in the data
10 processing as necessary to ensure that the data given to the vendors
11 roughly equated to the data returned by the reviewing attorneys and
12 vendors, and to notice when no privileged documents were added to the
13 privilege log he had signed after a large ESI production. Though
14 attorneys Goldenberg and Vanderhoof also abdicated their duties and
15 were also involved in the discovery conferences, depositions, and the
16 ESI process, as lead counsel, the responsibility falls on Mr. O'Leary and
17 his firm.

18 **d. Post-Discovery Document Dump**

19 Rule 37 sanctions are also appropriate against Defendant RFT
20 and its attorneys for the post-discovery document dump of more than
21 half of the documents they ultimately produced in this action, which
22 they admit should have been produced much earlier. Defendant RFT—
23 despite sworn assurances that it had already complied with Magistrate
24 Judge Burkhardt's Order requiring completion of its document
25 production by August 4, 2014—failed to produce well over 375,000

1 pages of responsive documents until after the filing of this motion and
2 the close of discovery.

3 Defendants explain the bulk of the documents were inadvertently
4 withheld because the ESI vendor accidentally failed to export all of the
5 data to be produced. (ECF No. 269-28 (Stefan Decl.) ¶ 5).

6 The data export error is strikingly similar—but even more
7 egregious—than the uploading error that occurred in *In re*
8 *Delta/AirTran Baggage Fee Antitrust Litigation*, 846 F.Supp.2d 1335,
9 1342 (N.D. Ga. 2012). In that case, Delta’s attorney instructed Delta’s
10 IT department to upload the custodian’s hard drives to Clearwell, the
11 document management and search tool they were using for document
12 production. Two weeks later, Delta’s attorney followed up with the IT
13 department to make sure all of the data that had been collected had
14 indeed been uploaded to Clearwell. Despite confirmation from the IT
15 department, not all of the data had been uploaded. The uploading
16 error, combined with a failure to review two hard drives and backup
17 tapes, resulted in the late production of 60,000 pages of documents.
18 The *In re Delta* court found fault and prejudice, and exercised its
19 authority under Rule 37 to reopen discovery and impose monetary
20 sanctions, including the moving party’s reasonable costs and attorneys’
21 fees, against Delta. Likewise, this Court finds Defendants and their
22 attorneys at fault for failing to monitor the document production and
23 the ESI vendor. The error was concealed and compounded by their
24 blind assurances that all documents had been produced.

25

1 Moreover, Defendants and their attorneys are at fault for the
2 delay in producing the May 2015 data set. Defendants' attorneys
3 attribute the delay in producing the May 2015 document subset to four
4 problems: 1) the ESI vendor mistakenly did not provide a subfolder of
5 data it had prepared when investigating its prior error in December
6 2014, 2) data searches did not include Mark Sullivan's
7 "business.management" email address, 3) data searches did not include
8 the term "attune," and 4) non-privileged attachments to privileged
9 emails were withheld in error. (*Id.*).

10 Counsel claims they did not search (or instruct vendors to search)
11 Mark Sullivan's "business.management" email account, because counsel
12 was unaware that Mark Sullivan used both the "MarkS" and the
13 "business.management" email addresses. Counsel should have known
14 to search the "business.management" address because Mark Sullivan
15 produced emails with that address during his deposition in April 2014.
16 (ECF No. 268-21 (Exh. 14)). Defendants knew Mr. Sullivan used the
17 address, because Defendant RFT issued it to him and Defendant
18 Noorian reviewed emails Mr. Sullivan sent using that address in the zip
19 file on December 6, 2012. (*Id.*). Defendant and counsel should also
20 have known to include "attune" as a search term in their ESI
21 production, because that is the term Mark Sullivan used in his email
22 and zip file search. Defendant Noorian knew this from his December 6,
23 2012 review of Mark Sullivan's files, and Defendants attorneys, and Mr.
24 O'Leary and Mr. Goldenberg specifically, should have known this after
25

1 Mark Sullivan produced the documents relying on attune as a search
2 term.

3 The Court concludes that Defendants and their attorneys are at
4 fault for the post-discovery document dump. Mr. O'Leary and his firm's
5 abdication of their roles in crafting and implementing an effective
6 discovery process warrants sanctions. Mr. Goldenberg's efforts fell
7 woefully short of his responsibilities to ensure an ESI methodology was
8 crafted that adequately captured responsive data, particularly because
9 Mr. Goldenberg was the only attorney involved from the start and had a
10 long-time relationship with Defendants that granted him familiarity
11 with Defendants and their data. Mr. Vanderhoof also failed in his duty
12 to craft, implement, and test a reasonable ESI protocol. Nevertheless,
13 the Court finds sanctions are not warranted against Mr. Goldenberg
14 and Mr. Vanderhoof personally.

15 **ii. Prejudice**

16 The Court finds that sanctions are necessary because Plaintiff was
17 precluded by Defendants' conduct from fully discovering the extent and
18 impact of distribution of the Structural Failures Report and average
19 repair rate information. Prejudice is determined by evaluating whether
20 the spoliating party's actions impaired the non-spoliating party's ability
21 to go to trial, threatened to interfere with the rightful decision of the
22 case, or forced the non-spoliating party to rely on incomplete and spotty
23 evidence. *In re Hitachi Television Optical Block Cases*, No. 08cv1746-
24 DMS-NLS, 2011 WL 3563781, *6 (S.D. Cal. August 12, 2011) (citing
25 *Leon v. IDX Systems Corp.*, 464 F.3d 951, 959 (9th Cir. 2006)).

1 Spoliation of evidence raises the presumption that the destroyed
2 evidence goes to the merits of the case, and that such evidence was
3 adverse to the party that destroyed it. *Apple II, supra*, 888 F.Supp.2d
4 at 998 (citing *Hynix Semiconductor v. Rambus*, 591 F.Supp.2d 1038,
5 1060 (N.D. Cal. 2006), *vacated on other grounds in* 645 F.3d 1336 (D.C.
6 Cir. 2011)).

7 Defendants contend that sanctions are not appropriate, because
8 the documents have now all been produced and trial has yet to occur, or
9 will not occur because of the anticipated settlement.

10 Plaintiff counters that not all documents have been produced and
11 it has been “exceedingly difficult for HME to identify sales it may have
12 lost as a result of” Defendants’ distribution of the Structural Failures
13 Report and related information, because the spoliation prevented
14 Plaintiff from identifying all of the recipients.

15 Defendants respond that Plaintiff was able to identify hundreds of
16 customers or potential customers in Plaintiff’s opposition to Defendants’
17 summary judgment motion. Indeed, in opposition to the summary
18 judgment motion, Plaintiff’s expert declared that he was provided lists
19 of “overlapping customers,” which included HME customers or
20 prospects who made purchases from RFT or Panasonic for the first time
21 while the trade libel is alleged to have occurred. (ECF No. 275-1 ¶6-9).

22 Plaintiff could have used these lists to identify sales lost to
23 Defendant RFT and Panasonic, but the overlapping customer lists are
24 useless for determining sales lost to other competitors. And the Report
25 may be in the hands of potential customers who had not yet made a

1 purchase from RFT and Panasonic when the overlapping customer lists
2 were prepared. Although the difficulty in identifying lost sales
3 attributable to the missing documents has been alleviated by the
4 overlapping customer lists, the prejudice has not been cured. It
5 remains unknown how widely the Structural Failures Report was
6 distributed, to whom, and how it influenced their purchasing behavior.

7 Plaintiff also emphasizes that Defendant did not produce the
8 Sullivan email and attached zip file until April 14, 2015, and that it is
9 incomplete. Defendants' inability to find documents known to be
10 missing raises the unrebuted presumption that other unidentified
11 relevant documents that are favorable to Plaintiff are also missing.
12 Even if Defendants have now completed production of all non-destroyed
13 documents, Defendants did not do so until months after the close of
14 discovery. As a result, Plaintiff did not have the benefit of those
15 documents while selecting deponents, taking depositions, conducting
16 third party discovery, and preparing its trial strategy and pre-trial
17 documents. Plaintiff has had to divert resources to pursuing the
18 missing documents and reviewing—on an expedited basis—the
19 documents Defendant dumped on Plaintiff at the last minute. The
20 diversion of resources necessitated by the spoliation distraction creates
21 a further “risk of erroneous judgment on this claim.”

22 In addition, Plaintiff has expended significant resources in
23 compelling Defendants to comply with their discovery obligations.
24 Plaintiff conservatively estimates its costs and fees at approximately
25 \$52,000. Defendants and their attorneys have made no offer to

1 voluntarily cover any of the Plaintiff's costs and fees that were
 2 necessitated by the discovery problems.

3 On the other hand, the fact that Plaintiff did not ask the Court to
 4 re-open discovery suggests that Plaintiff's ability to go to trial is no
 5 longer impaired. It may also be that evidence that Plaintiff would have
 6 obtained absent Defendants' misconduct would merely be cumulative of
 7 the evidence Plaintiff now has.

8 The Court concludes Defendants' spoliation has not impaired
 9 Plaintiff's ability to go to trial, but has *threatened* to interfere with the
 10 rightful decision of the case, and may force Plaintiff to rely on
 11 incomplete and spotty evidence. *See Leon, supra*, 464 F.3d at 959.

12 Consequently, the Court finds Defendant RFT and its attorneys
 13 responsible under Rule 37 for the spoliation of relevant documents
 14 favorable to Plaintiff and for violating Magistrate Judge Burkhardt's
 15 July 3, 2014 Order. The Court finds Plaintiff was prejudiced by the
 16 destruction and late production of documents, and further finds that the
 17 tardy production of documents has not fully cured the prejudice to
 18 Plaintiff. The Court also finds that Defendants' destruction of
 19 documents and failure to timely provide ESI did not result from "the
 20 routine, good-faith operation of an electronic information system." *See*
 21 FED. R. CIV. P. 37(e).

22 **b. Proposed Amended Rule 37**

23 In anticipation of the amendment of Rule 37, the Court further
 24 finds that it would reach the same result under the proposed amended
 25 Rule 37. The proposed changes to Rule 37 are expected to take effect on

1 December 1, 2015, absent unforeseen circumstances. Subsection (b) of
2 Rule 37, under which this Court has analyzed this motion, is expected
3 to remain unchanged. But the new Rule 37(e) states:

4

5 **(e) Failure to Preserve Electronically Stored**
6 **Information.** If electronically stored information that
7 should have been preserved in the anticipation or
8 conduct of litigation is lost because a party failed to take
9 reasonable steps to preserve it, and it cannot be restored
10 or replaced through additional discovery, the court:

- 11
- 12 (1) upon finding prejudice to another party from
13 loss of the information, may order measures
14 no greater than necessary to cure the
15 prejudice; or
- 16 (2) only upon finding that the party acted with the
17 intent to deprive another party of the
18 information's use in the litigation may:
- 19
- 20 (A) presume that the lost information was
21 unfavorable to the party;
- 22
- 23 (B) instruct the jury that it may or must
24 presume the information was unfavorable
25 to the party; or
- 26
- 27 (C) dismiss the action or enter a default
28 judgment.

29 Proposed amended Rule 37(e) as submitted to Congress on April 29,
30 2015, after adoption by the U.S. Supreme Court, *available at*
31 <http://www.uscourts.gov/file/document/congress-materials> (last accessed
32 on June 16, 2015).

1 The new Rule 37 and its Advisory Committee Notes do not
2 address the interplay of subsection (b) with subsection (e). In this
3 instance, subsection (b) would apply because Defendant and its
4 attorneys violated Magistrate Judge Burkhardt's Order to produce the
5 ESI at issue.

6 Even if subsection (e) applied instead of subsection (b), the Court
7 would reach the same result on this record. The Court has already
8 found that Plaintiff was prejudiced by the destruction and delayed
9 production of documents. The Court further finds that Defendants
10 intended to deprive Plaintiff of the use of the information the sales force
11 deleted in response to Defendant Noorian's command. Defendant
12 Noorian asked for and commanded the deletion of these documents
13 specifically because they were relevant to this lawsuit. Accordingly, the
14 Court finds Plaintiff has made a sufficient showing under the proposed
15 amended Rule 37 to warrant the same sanctions that the Court finds, in
16 the following section, are appropriate under the current Rule 37.

17 **3. Sanctions**

18 Sanctions imposed by the court "should be designed to: (1) deter
19 parties from engaging in spoliation; (2) place the risk of an erroneous
20 judgment on the party who wrongfully created the risk; and (3) restore
21 the prejudiced party to the same position he would have been in absent
22 the wrongful destruction of evidence by the opposing party." *West v.*
23 *Goodyear Tire & Rubber Co.*, 167 F.3d 776, 779 (2d Cir. 1999).

24 Plaintiff requests various forms of sanctions. Plaintiff does not
25 seek the most extreme type of relief: an outright entry of judgment

1 against Defendants. Plaintiff also does not seek the least extreme type
 2 of relief: the re-opening of discovery. The Court has considered the
 3 various types of sanctions Plaintiff seeks, and finds that monetary
 4 sanctions, issue sanctions, and an adverse inference instruction are
 5 appropriate, as set forth below.

6 **a. Monetary Sanctions**

7 As provided by current Rule 37(b)(2)(C), the Court is required to
 8 impose reasonable expenses, including attorney' fees, upon "the
 9 disobedient party, the attorney advising that party, or both." The Court
 10 must impose costs unless the failure to comply with the court order was
 11 "substantially justified or other circumstances make an award of
 12 expenses unjust." *Id.* Similarly, Rule 26(g)(3) requires an award of
 13 reasonable fees and costs.

14 The Court finds that sanctions must be imposed against
 15 Defendant RFT (the disobedient party) and the LeClairRyan LLP firm
 16 and Thomas O'Leary personally under Rule 37.⁵ The Court further
 17 finds that sanctions must be imposed against Defendants Noorian, RFT,
 18 and attorney Thomas O'Leary under Rule 26(g)(3).

19 Due to the duration, frequency and severity of the discovery
 20 abuses, tracing the direct causal link between the pervasive misconduct
 21 and the fees and costs incurred is not possible. *See Chambers, supra,*
 22 501 U.S. at 56; *Haeger, supra*, --F.3d-- at 26-38. The Court will award
 23 compensatory sanctions in the form of all attorneys' fees and costs

24
 25 ⁵ Rule 37 sanctions will not be imposed on Noorian. *See*, n.4, above.

1 incurred by Plaintiff in seeking discovery from Defendants from October
2 18, 2013, when Defendant served its first discovery responses
3 containing false certifications, to date. Because the Defendants'
4 discovery was intentionally flawed from the beginning, the Court is
5 imposing all monetary sanctions concurrently under both Rule 26(g)(3)
6 and Rule 37. Each disciplinary authority is independently sufficient to
7 warrant the full extent of monetary sanctions imposed. The Court will
8 determine the amount and apportionment of the award by separate
9 order following receipt of the necessary information from counsel for
10 Plaintiff.

11 **b. Contempt**

12 Plaintiff also seeks a finding of contempt against Defendants
13 based on their failure to comply with Magistrate Judge Burkhardt's
14 July 3, 2014, Order. In this request, Plaintiff appears to be seeking civil
15 (*i.e.*, coercive) rather than criminal (*i.e.*, punitive) contempt. (*See* ECF
16 No. 288 at 39:23 (relying on the standard for finding civil contempt)).
17 The Court agrees with Plaintiff that Defendant RFT violated
18 Magistrate Judge Burkhardt's specific and definite Order, that
19 Defendant RFT did not take every reasonable step to comply with that
20 order, and that compliance was possible. Nevertheless, the Court is not
21 persuaded that Defendant Noorian can be held in contempt for violating
22 the Order requiring Defendant RFT to complete its production. The
23 Court is also not persuaded that either Defendant has the ability to
24 satisfy a civil contempt order requiring them to produce additional
25 documents.

1 To the extent that Plaintiff's request is geared towards coercing
2 the production of the missing documents, the filing of the motion has
3 had the intended effect. In addition, Plaintiff has not shown that
4 Defendants have the ability to comply with a contempt order crafted to
5 coerce further production of documents. If, as it appears, Defendants
6 destroyed documents, then Defendants have no ability to produce the
7 destroyed documents. Thus, a coercive contempt order would be
8 inappropriate with respect to the destroyed documents.

9 The Defendants also argue that all missing documents have now
10 been produced. If true, Defendants lack the ability to produce more
11 documents. The Court is wary of Defendants' claim that there are no
12 more documents to produce, given this record. But Plaintiff has not met
13 its burden to show that Defendant has relevant documents that
14 survived destruction and have not now been produced.

15 Accordingly, the Court finds a civil contempt finding
16 inappropriate. Plaintiff's motion for a contempt certification from this
17 Court to the District Judge is **DENIED**.

18 **c. Report and Recommendation for Issue Sanctions**
19 **and Adverse Inference Instruction**

20 **i. Introduction**

21 This Report and Recommendation is submitted to United States
22 District Judge Cynthia Bashant pursuant to 28 U.S.C. §636 and Local
23 Civil Rule 72.1(c) of the United States District Court for the Southern
24 District of California. In this Report and Recommendation, this Court
25 **RECOMMENDS** that the district court **GRANT** Plaintiff's request for

1 issue sanctions and an adverse inference instruction against
2 Defendants if the settlement is not finalized and the matter proceeds to
3 trial.

4 The Court has considered whether lesser sanctions are sufficient,
5 and finds they are not. Specifically, Magistrate Judge Burkhardt
6 already imposed monetary sanctions on Defendant RFT for failure to
7 comply with a discovery order concerning these documents. The
8 imposition of monetary sanctions had, at best, a fleeting effect on
9 Defendants and their attorneys. Moreover, the imposition of monetary
10 sanctions alone will not cure the prejudice to Plaintiff.

11 **ii. Issue Sanctions**

12 The Court **RECOMMENDS** finding that Plaintiff's requested
13 issue sanction in the form of a finding that the Report is false is
14 appropriate. Plaintiff has shown that the spoliated documents relate to
15 RFT's creation of the Report and show that it was not an internal report
16 prepared by Plaintiff. Because Defendants destroyed the documents
17 that they knew related directly to Plaintiff's claims after (and because)
18 this case was filed, the parties and the Court cannot review the contents
19 of the destroyed documents. Therefore, it is appropriate to transfer the
20 risk of uncertainty from Plaintiff to Defendant as to whether the
21 destroyed documents included a party admission by RFT that the
22 Structural Failures Report was false.

23 The Court further finds sufficient grounds for establishing as a
24 fact that Defendants fabricated the average rate of repair and lifetime

25

1 cost of the ION IQ as presented in materials created by Defendants, and
 2 did so with knowledge that the figures had no reliable basis.

3 Accordingly, this Court **RECOMMENDS GRANTING** Plaintiff's
 4 motion to establish as a fact that the Structural Failures Report is false,
 5 and that Defendants fabricated the average rate of repair and lifetime
 6 cost figures.

7 **iii. Adverse Inference Instruction Standard**

8 Adverse inference instructions are appropriate when a party
 9 destroys evidence or refuses to timely produce documents. *Residential*
 10 *Funding Corp, v. DeGeorge Fin. Corp.*, 306 F.3d 99, 107 (2d Cir. 2002);
 11 *but see* Committee Note to proposed new Rule 37(e)(2) (rejecting
 12 *Residential Funding* on other grounds). Specifically, Plaintiff requests
 13 "an adverse inference instruction that (1) relevant documents
 14 Defendants failed to timely produce, or to produce at all, are harmful to
 15 Defendants, and (2) Defendants were aware of the falsity of the
 16 Structural Failures document and the average repair rate information,
 17 and encouraged distribution of the same." (ECF No. 288 at 39:16-20).

18 The Court finds that the first instruction requested is warranted.
 19 The majority of courts, including many courts in the Ninth Circuit,
 20 apply "the three-part test set forth in *Zubulake v. UBS Warburg, LLC*,
 21 220 F.R.D. 212, 216 (S.D. N.Y. 2003), for determining whether to grant
 22 an adverse inference spoliation instruction." *Apple v. Samsung*, 881
 23 F.Supp.2d 1132, 1138 (N.D. Cal. 2012) ("*Apple I*"); *Lewis v. Ryan*, 261
 24 F.R.D. 513, 518 (S.D. Cal. 2009); *Zest IP Holdings, LLC v. Implant*
 25 *Direct Mfg., LLC*, No. CIV. 10-0541-GPC WVG, 2013 WL 6159177, at *5

1 (S.D. Cal. Nov. 25, 2013), report and recommendation adopted in part,
 2 No. CIV. 10-541-GPC WVG, 2014 WL 6851607 (S.D. Cal. June 16,
 3 2014).

4 In *Zubulake IV*, the court stated:

5 A party seeking an adverse inference instruction
 6 (or other sanctions) based on the spoliation of evidence
 7 must establish the following three elements: (1) that the
 8 party having control over the evidence had an obligation
 9 to preserve it at the time it was destroyed; (2) that the
 10 records were destroyed with a ‘culpable state of mind’
 11 and (3) that the evidence was ‘relevant’ to the party’s
 12 claim or defense such that a reasonable trier of fact
 13 could find that it would support that claim or defense.

14 *Zubulake IV*, 220 F.R.D. at 220 (citing *Residential Funding Corp. supra*,
 15 306 F.3d at 108); *see also Apple II*, 888 F.Supp.2d at 989–90; *but see*
 16 Advisory Committee Notes to proposed new Rule 37(e)(2) (rejecting
 17 cases such as *Residential Funding* “that authorize the giving of adverse-
 18 inference instructions on a finding of negligence or gross negligence.”).

19 “When evidence is destroyed in bad faith, that fact alone is
 20 sufficient to demonstrate relevance.” *Zubulake IV, supra*, 220 F.R.D. at
 21 220. “By contrast, when the destruction is negligent, relevance must be
 22 proven by the party seeking the sanctions.” *Id.*

23 Under current Rule 37, to find a “culpable state of mind,” a court
 24 need only find that a spoliator acted in “conscious disregard” of its
 25 obligations to not destroy documents. *Apple II*, 888 F.Supp.2d at 989–
 990, (citing *Hamilton v. Signature Flight Support Corp.*, 2005 WL
 3481423, at *7 (N.D. Cal. 2004); *Io Group v. GLBT, Ltd.*, 2011 WL

1 4974337, at *7 (N.D. Cal. 2011)). Where, however, a non-spoliating
 2 party fails to show a degree of fault and level of prejudice, negligent
 3 destruction of documents does not warrant an adverse inference
 4 instruction or evidence preclusion. *Apple II*, 888 F.Supp.2d at 993.

5 If spoliation is shown, the burden of proof shifts to the guilty party
 6 to show that no prejudice resulted from the spoliation, because that
 7 party “is in a much better position to show what was destroyed and
 8 should not be able to benefit from its wrongdoing.” *Apple II*, 888
 9 F.Supp.2d at 998 (citing *Hynix Semiconductor v. Rambus*, 591
 10 F.Supp.2d 1038, 1060 (N.D. Cal.2006), *vacated on other grounds in* 645
 11 F.3d 1336 (D.C. Cir. 2011)); *In re Hitachi*, 2011 WL 3563781, at *6.

12 **iv. Analysis re Adverse Inference Instruction**

13 As explained earlier in this Order, the Court finds that spoliation
 14 of evidence that Defendants controlled occurred after the duty to
 15 preserve it arose and that Defendants acted with a culpable state of
 16 mind. Plaintiff is prejudiced by the destruction of the Structural
 17 Failures Report related documents, because the contents of these
 18 documents are directly relevant to showing lost sales with respect to the
 19 trade libel and unfair competition claims at issue in this litigation. As a
 20 result, Plaintiff is now forced to go to trial while relying on incomplete
 21 evidence.

22 Defendants attempt to rebut the presumption of prejudice by
 23 stating that they produced all of the documents that were missing as a
 24 result of errors, that Plaintiff has not shown that any specific emails or
 25 documents are still missing, and that any documents that were

1 destroyed were merely “copies” of the Structural Failures Report that
2 Plaintiff already has. None of these contentions actually rebut the
3 presumption. Defendants’ assumption that the employees only deleted
4 identical copies of the Structural Failures Report is unsupported
5 conjecture. Defendants did not offer any forensic evidence to support
6 their position. Further, Plaintiff has pointed to the incomplete zip file
7 and missing documents captured in the five screen shots. It is not
8 possible for Plaintiff to point to additional specific documents that were
9 destroyed precisely because Defendants destroyed them before Plaintiff
10 could review them. Plaintiff has submitted sufficient evidence for this
11 Court to determine that documents relevant to the claims in this action
12 were destroyed because of Defendants' culpable conduct.

13 v. Recommended Adverse Inference Instruction

14 As a sanction for Defendants’ spoliation of relevant evidence, the
15 Court **RECOMMENDS GRANTING** Plaintiff’s motion that an adverse
16 inference instruction should be read to the jury. An adverse inference
17 instruction for spoliation of evidence can take many forms, ranging in
18 degrees of harshness. *Pension Comm.*, *supra*, 685 F.Supp.2d at 470–71.
19 Based on Defendants' intentional deletion of documents it knew to be
20 relevant, the Court **RECOMMENDS** that the jury be instructed as
21 follows:

22 Defendants, after learning that Plaintiff had sued
23 Defendant RFT, destroyed relevant evidence for Plaintiff's
24 use in this litigation. The deleted evidence pertains to the
25 creation and distribution of the Structural Failures Report

1 and the average repair rate of Plaintiff's products, which
2 pertains to Plaintiff's unfair competition and trade libel
3 claims.

4 You should presume from that destruction that the
5 evidence destroyed was relevant to Plaintiff's case and that
6 the destroyed evidence was favorable to Plaintiff.

7 You may, if you deem appropriate, take the destruction
8 of documents into account in assessing the elements of
9 Defendants' intent and knowledge, of whether the Structural
10 Failures Report or average repair rate information were a
11 substantial factor in causing Plaintiff damage, whether
12 Plaintiff was damaged, and the amount of damage Plaintiff
13 suffered.

14 See *E.I. du Pont de Nemours and Co. v. Kolon Indus., Inc.*, 803
15 F.Supp.2d 469, 509 (E.D. Va. 2011); *Food Service of America, Inc. v.*
16 *Carrington*, No. CV-12-00175-PHX-GMS, 2013 WL 4507593, at *22 (D.
17 Ariz. Aug. 23, 2013); *Chamberlain v. Les Schwab Tire Center of*
18 *California*, No. 2:11-CV-03105-JAM, 2012 WL 6020103 at *6 (E.D. Cal.
19 Dec. 3, 2012); *Zest IP Holdings, LLC, supra*, 2013 WL 6159177, at *5.

20 **Conclusion**

21 In conclusion, the Court **GRANTS** in part and **DENIES** in part
22 Plaintiff's request for sanctions, and **DENIES** Plaintiff's request for a
23 certification of contempt findings.

24 Specifically, the Court **GRANTS** Plaintiff's request for reasonable
25 attorneys' fees and costs incurred as a result of Defendants' discovery

1 misconduct, pursuant to Rules 26(g)(3) and 37. The Court will award
2 compensatory sanctions that represent all reasonable fees and costs
3 Plaintiff incurred in collecting discovery from Defendants from October
4 18, 2013 to date. The Court will determine the amount and
5 apportionment of the award by separate order. Plaintiff must file a
6 motion for attorneys' fees and costs within fourteen (14) days of the date
7 of this Order. The motion should contain the necessary documentation
8 and declarations regarding costs and fees. *See ECF 185 at 16; Blum v.*
9 *Stenson*, 465 U.S. 886, 895 n.11 (1984); *Haeger v. Goodyear Tire and*
10 *Rubber Co.*, Case No. 2:05-cv-02046-ROS, ECF No. 1125 (D. Ariz.
11 August 26, 2013). Defendants and counsel may file an opposition to the
12 fees motion no later than fourteen (14) days following the filing of the
13 motion.

14 In the event that the parties do not finalize their noticed
15 settlement, the Court further **RECOMMENDS** that the district judge
16 issue an order: (1) **ADOPTING** the Report and Recommendation
17 contained in this Order, (2) **GRANTING** Plaintiff's motion for an issue
18 sanction against Defendants that the Structural Failures Report is false
19 and an issue sanction that the Defendants fabricated the HME ION IQ
20 average rate of repair and lifetime cost figures in sales materials, and
21 did so with knowledge that the figures had no reliable basis, and (3)
22 **GRANTING** Plaintiff's request for the adverse inference as
23 recommended herein. Any objections to the Report and
24 Recommendation contained in this Order must be filed with the district
25 court judge within 14 days of a notification from the parties that their

1 noticed settlement did not come to pass. FED. R. CIV. P. 72(a); CIV. L.R.
2 72.1(b). The parties are advised that failure to file objections within the
3 specified time may waive the right to raise those objections on appeal of
4 the court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

5 In addition, any party objecting to this Order or the Report and
6 Recommendation in this Order is **ORDERED** to deliver to the district
7 judge's chambers a complete set of the papers relating to this motion,
8 included docket entries cited in this Order, in fully-tabbed, well-
9 organized binders within one business day of the date the party files
10 their objections.

11

12 **IT IS SO ORDERED.**

13

14

15 Dated: August 7, 2015


16 Hon. Mitchell D. Dembin
17 United States Magistrate Judge

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25